DOCKET

SUPREME COURT

No. 13-1032

Title:	Direct Marketing Association, Petitioner v. Barbara Brohl, Executive Director, Colorado Department of Revenue
Docketed:	February 27, 2014
Linked with 13A633	
Lower Ct:	United States Court of Appeals for the Tenth Circuit
Case Nos.:	(12-1175)
Decision Date:	August 20, 2013
Rehearing Denied:	October 1, 2013

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Dec 16 2013	Application (13A633) to extend the time to file a petition for a writ of certiorari from December 30, 2013 to February 28, 2014, submitted to Justice Sotomayor.
Dec 19 2013	Application (13A633) granted by Justice Sotomayor extending the time to file until February 28, 2014.
Feb 25 2014	Petition for a writ of certiorari filed. (Response due March 31, 2014)
Mar 10 2014	Waiver of right of respondent Barbara Brohl, Executive Director, Colorado Department of Revenue to respond filed.
Mar 26 2014	DISTRIBUTED for Conference of April 18, 2014.
Mar 31 2014	Brief amicus curiae of Council on State Taxation filed.
Apr 7 2014	Response Requested . (Due May 7, 2014)
Apr 22 2014	Order extending time to file response to petition to and including June 6, 2014.
Jun 6 2014	Brief of respondent Barbara Brohl, Executive Director, Colorado Department of Revenue in opposition filed. (Distributed)
Jun 10 2014	DISTRIBUTED for Conference of June 26, 2014.
Jun 17 2014	Reply of petitioner Direct Marketing Association filed. (Distributed)
Jun 30 2014	DISTRIBUTED for Conference of June 30, 2014.
Jul 1 2014	Petition GRANTED.
Jul 31 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Aug 1 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Aug 6 2014	The time to file the joint appendix and petitioner's brief on the merits is extended to and including September 9, 2014.
Aug 6 2014	The time to file respondent's brief on the merits is extended to and including October

	17, 2014.
Sep 4 2014	SET FOR ARGUMENT on Monday, December 8, 2014.
Sep 9 2014	Joint appendix filed. (Statement of costs filed)
Sep 9 2014	Brief of petitioner Direct Marketing Association filed.
Sep 15 2014	Brief amicus curiae of Institute for Professionals in Taxation filed.
Sep 16 2014	Brief amicus curiae of Tax Foundation filed.
Sep 16 2014	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Sep 16 2014	Brief amicus curiae of Council on State Taxation filed.
Sep 16 2014	Brief amici curiae of NFIB Small Business Legal Center, et al. filed.
Sep 22 2014	Record requested from U.S.C.A. 10th Circuit.
Oct 17 2014	Brief of respondent Barbara Brohl, Executive Director, Colorado Department of Revenue filed.
Oct 24 2014	Brief amici curiae of National Governors Association, et al., filed.
Oct 24 2014	Brief amici curiae of States of Illinois, et al. filed. (Distributed)
Oct 24 2014	Brief amicus curiae of Multistate Tax Commission filed. (Distributed)
Oct 24 2014	Brief amici curiae of Interested Law Professors filed. (Distributed)
Oct 27 2014	CIRCULATED.
Oct 31 2014	Record received from U.S.C.A. 10th Circuit. The record is electronic and located on PACER. One box of records also received from the 10th Circuit.
Nov 17 2014	Reply of petitioner Direct Marketing Association filed. (distributed)
Dec 8 2014	Argued. For petitioner: GeorgeS. Isaacson, Lewiston, Maine. For respondent: Daniel D. Domenico, Solicitor General, Denver, Colo.
Mar 3 2015	Judgment REVERSED and case REMANDED. Thomas, J., delivered the opinion for a unanimous Court. Kennedy, J., filed a concurring opinion. Ginsburg, J., filed a concurring opinion, in which Breyer, J., joined, and in which Sotomayor, J., joined in part.
Apr 6 2015	JUDGMENT ISSUED.
Apr 8 2015	Record from U.S.C.A. 10th Circuit has been returned.

PETITION
FOR
WRIT OF
CERTIORARI

RECORD
AND
BRIEFS

13-1032

Supreme Court, U.S.
FILED
FEB 25 2014
OFFICE OF THE CLERK

No. ___-______

IN THE
Supreme Court of the United States

DIRECT MARKETING ASSOCIATION,
Petitioner,

v.

BARBARA BROHL,
IN HER CAPACITY AS EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF REVENUE,
Respondent.

**On Petition for a Writ of Certiorari
to the Tenth Circuit Court of Appeals**

PETITION FOR A WRIT OF CERTIORARI and APPENDIX

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February 25, 2014

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QUESTION PRESENTED

The Tax Injunction Act, 28 U.S.C. § 1341 ("TIA"), provides, with regard to federal court jurisdiction, that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The Tenth Circuit Court of Appeals held that the TIA bars the exercise of federal court jurisdiction over a suit brought by the Petitioner challenging the constitutionality of a Colorado law, Colo. Rev. Stat. §§ 39-21-112(3.5)(c) & (d), which imposes informational notice and reporting requirements, and substantial penalties for non-compliance, on out-of-state retailers that do not collect Colorado sales tax.

The Tenth Circuit's ruling diverges from this Court's leading precedent and creates a split among the Circuit Courts of Appeals regarding the scope of the TIA's limitation on federal court jurisdiction, presenting the following question:

> Whether the TIA bars federal court jurisdiction over a suit brought by non-taxpayers to enjoin the informational notice and reporting requirements of a state law that neither imposes a tax, nor requires the collection of a tax, but serves only as a secondary aspect of state tax administration?

PARTIES TO THE PROCEEDING

Petitioner Direct Marketing Association was the plaintiff and appellee in the proceedings below. Respondent Barbara Brohl, the appellant below, is the Executive Director of the Colorado Department of Revenue. The defendant in the District Court proceedings was the former Executive Director, Roxy Huber. Ms. Brohl was substituted for Ms. Huber for purposes of the appeal.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Direct Marketing Association states the following:

Direct Marketing Association is a not-for-profit corporation, and, as such, has no parent corporation and has issued no stock held by any publicly-traded corporation.

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Petitioner Direct Marketing Association ("the DMA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

INTRODUCTION

This case marks an important opportunity for the Court to clarify the proper scope of federal court jurisdiction in light of the TIA. The Tenth Circuit's ruling that the TIA prevents the exercise of jurisdiction over a suit by a group of non-taxpayers challenging state law notice and reporting requirements improperly expands the ambit of the TIA beyond the limits intended by Congress. As described by this Court in *Hibbs v. Winn*, 542 U.S. 88, 107 (2004), Congress intended the Act to serve as a jurisdictional bar only in cases "in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes." A writ of certiorari is necessary in this case to permit the Court to reinforce the limits of the TIA consistent with Congressional intent, to resolve a conflict among the circuits concerning the authority of federal courts to hear challenges to non-tax measures that are only indirectly related to the payment of state taxes, and to reiterate the Court's caution that the TIA does not preclude federal court review of "all aspects of state tax administration." *Hibbs*, 542 U.S. at 105 (rejecting argument advanced by state officials regarding the scope of the TIA).

Neither party argued before the Tenth Circuit that the TIA foreclosed federal court jurisdiction in this case. Thus, neither party fully briefed the issues presented by this appeal below. The Tenth Circuit's decision, however, has potentially far-reaching ramifications for federal court jurisdiction over actions challenging regulatory measures indirectly related to state taxes. By adopting an interpretation of the TIA that diverges from this Court's definitive statement of Congressional intent in *Hibbs* and conflicts with prior decisions in at least two other circuits, the Tenth Circuit decision risks causing further confusion regarding the proper exercise of federal court jurisdiction over cases falling outside the boundaries of the TIA. At a minimum, the Tenth Circuit's ruling creates a situation in which federal court jurisdiction in light of the TIA differs depending upon the circuit in which a state law is subject to challenge. A writ of certiorari will bring clarity to the application of an important federal statute and avoid further division among the circuits as similar cases arise in the future.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App. A-1 – A-33) is reported at 735 F.3d 904. The Tenth Circuit's order denying rehearing (App. D-1 – D-2) is not reported. The order of the United States District Court for the District of Colorado granting the DMA's motion for summary judgment and entering a permanent injunction (App. B-1 – B-25) is not reported. The order of the District Court granting a preliminary injunction (App. C-1 – C-17) is not reported.

JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was issued on August 20, 2013. On September 18, 2013, the DMA filed a petition for rehearing en banc with the Tenth Circuit. On October 1, 2013, the Tenth Circuit denied the petition for rehearing. On December 19, 2013, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to and including February 28, 2014. *See* No. 13A633. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Tax Injunction Act provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The relevant provisions of the Colorado Revised Statutes are reproduced in the Appendix at App. E-1 – E-4.

STATEMENT

1. Petitioner, the Direct Marketing Association, is a not-for-profit corporation with headquarters in New York, New York. C.A. Appx. 48 (*First Amended Complaint ("Compl.")* ¶ 2). Founded in 1917, the DMA is the leading trade association of businesses and nonprofit organizations using and supporting multichannel marketing methods, with thousands of members from all fifty states and numerous foreign countries. *Id.* Members of the DMA market their products directly to consumers via catalogs, magazine and newspaper advertisements, broadcast media, and the Internet. *Id.* Many DMA members have no office, store, property, employees or other physical presence in Colorado. C.A. Appx. 52 (*Compl.* ¶ 17). As a result, these non-Colorado retailers are not obli-

gated under state law to collect Colorado sales or use tax on retail sales to Colorado consumers and, moreover, are protected against the imposition of such a sales/use tax collection obligation under the "bright line" substantial nexus standard of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). Many DMA members with no physical presence in Colorado do not collect Colorado sales tax. C.A. Appx. 52.

2. Enacted by the Colorado General assembly in February 2010, Colo. Rev. Stat. §§ 39-21-112(3.5)(c) & (d) ("the Colorado Act") impose notice and reporting obligations on "each retailer that does not collect Colorado sales tax." *Id.* §§ 39-21-112(3.5)(c)(I), (d)(I)(A), (d)(II)(A). The Colorado Act is intended to apply solely to retailers who are protected from the imposition of Colorado sales and use tax collection obligations under *Quill*, *i.e.*, "non-collecting" retailers located outside the state. C.A. Appx. 134 (Re-revised version of House Bill 10-1193, amended after a third reading in the Colorado Senate on February 10, 2010) (the Colorado Act "relates to current law requiring a retailer to collect sales tax from a person residing in this state only if the retailer has sufficient connections with this state"). In June 2010, the Colorado Department of Revenue ("Department") adopted regulations to implement the Act. 1 Colo. Code Regs. § 201-1:39-21-112.3.5 (2010) ("the Regulations").

The Colorado Act and Regulations establish three separate obligations for non-collecting retailers: (1) in connection with each sale to a Colorado customer, the retailer must notify the purchaser that although the retailer does not collect Colorado sales tax, the purchaser is obligated to self-report Colorado use tax to the Department ("Transactional Notice"); (2) the retailer must provide certain Colorado purchasers (those purchasing over $500 in goods from the retailer) annually, by First Class Mail, a detailed listing of their purchases, while also informing each such customer that s/he is obligated to report use tax on such purchases, and that the retailer is required by law to report the customer's name and total amount of purchases to the Department ("Annual Purchase Summary"); and (3) the retailer must turn over to the Department annually the name, billing address, all shipping addresses, and the total amount of purchases of each of its Colorado purchasers ("Customer Information Report"). *See* Colo. Rev. Stat. §§ 39-21-112(3.5)(c)(I), (d)(I)(A), (d)(I)(B), (d)(II)(A); 1 Colo. Code Regs. §§ 201-1:39-21-112.3.5(2), (3), & (4).

The Colorado Act and Regulations also impose substantial penalties on non-collecting retailers who fail to comply with the notice and reporting requirements. *See* Colo. Rev. Stat. §§ 39-21-112(3.5)(c)(II), (d)(III); 1 Colo. Code Regs. §§ 201-1:39-21-112.3.5(2)(f) ($5 penalty per Colorado sale as to which the Transactional Notice is not given, subject to $50,000 first year cap), (3)(d) ($10 penalty per Annual Summary not mailed, subject to $100,000 first-year cap), (4)(f) ($10 penalty per name not included on a Customer Information Report, subject to a $100,000 first-year cap).

The Colorado Act and Regulations do not, however, apply to in-state, Colorado retailers. Indeed, because retailers doing business in Colorado are required, under Colorado law, to obtain a sales tax license and to collect the sales tax from the purchaser at the time of the sale, the Colorado Act necessarily excludes in-state retailers from its requirements. *See* Colo. Rev. Stat. §§ 39–26–103(1)(a), 39–26–106(2)(a), 39–26–204(2).

3. The DMA in June 2010 filed a Complaint (amended in July 2010) in the federal District Court for the District of Colorado against the Department's Executive Director,[1] challenging the constitutionality of the Colorado Act and Regulations. C.A. Appx. 46–82 (*First Amended Complaint*). Jurisdiction in the District Court was based on 28 U.S.C. § 1331, in light of the federal questions presented by the Complaint. The DMA alleged multiple constitutional violations resulting from the Colorado Act, including claims under the Commerce Clause, the First Amendment, the right of privacy of Colorado consumers, and the Takings Clause. *Id.*

Soon after initiating the suit, the DMA moved for a preliminary injunction against the law's enforcement based on its Commerce Clause claims (Counts I and II). C.A. Appx. at 84-114. On January 26, 2011, the District Court entered an Order Granting Motion for Preliminary Injunction, enjoining the Executive Director from enforcing the Colorado Act and Regulations. *See* App. C-1 – C-17.

In March 2011, the parties agreed to file cross-motions for summary judgment on the DMA's Commerce Clause claims, with a stay of proceedings on all remaining claims. C.A. Appx. 1677-79. In March 2012, the District Court granted summary judgment in favor of the DMA on each of the Commerce Clause claims and entered a permanent injunction enjoining the enforcement of the notice and reporting obligations imposed under the Colorado law. *See* App. B-1 – B-25.

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[1] At the time the Executive Director was Roxy Huber. The current Executive Director, Barbara Brohl, was later substituted for Ms. Huber for purposes of the appeal.

4. The Executive Director appealed the entry of the permanent injunction on the merits. C.A. Appx. 2164-66. In their briefs filed with the Court of Appeals, neither party contested federal court jurisdiction. The Defendant addressed the TIA only in a footnote in each brief she filed, asserting that the Court could exercise jurisdiction without running afoul of the TIA. *See, e.g.,* Appellant's Brief at 31 n. 3. The DMA, in a two-page discussion in its jurisdictional statement, addressed those aspects of the TIA necessary to demonstrate its inapplicability. Appellee's Brief at 3-4. No further briefing was requested by the Court of Appeals prior to the issuance of its decision.

On August 20, 2013, the Tenth Circuit issued its opinion and accompanying judgment. *See* App. A-1 – A-33. The Court ruled that the TIA divested the District Court of jurisdiction to enjoin enforcement of the Colorado Act. *Id.* at A-33. The Court, therefore, did not reach the merits of the DMA's Commerce Clause claims, on which the District Court awarded the DMA summary judgment. *Id.* at A-3.

The Court of Appeals acknowledged that the DMA's suit "differs from the prototypical TIA case." *Id.* at A-18. The Court further conceded that "[e]ven if DMA's constitutional attack on the notice and reporting obligations were successful, Colorado consumers would still owe use taxes by law." *Id.* However, focusing on the word "restrain" in the TIA, the Court determined that the DMA's challenge to the Colorado Act was subject to the TIA because the suit "if successful, would limit, restrict, or hold back the state's chosen method of enforcing its tax laws and generating revenue." *Id.* at A-17. The Tenth Circuit concluded that the TIA applies "both to a lawsuit that would directly enjoin a tax and one that would enjoin a procedure required by the state's use tax statutes and regulations that aims to enforce and increase use tax collection." *Id.* at A-19.

In reaching its decision, the Tenth Circuit acknowledged this Court's caution that the TIA is not a "sweeping congressional direction to prevent 'federal-court interference with all aspects of state tax administration.'" *Id.* at A-20 – A-21 (*citing Hibbs*, 542 U.S. at 105). The Court of Appeals concluded, however, that the sole distinction under the TIA is between suits that would have the effect of increasing state tax revenues (like the challenge to state tax credits in *Hibbs*), over which jurisdiction is not prohibited, and suits that would "reduce the flow of revenues to the state," which trigger the TIA. *Id.* at A-21 (citing *Hibbs*, 542 U.S. at 106). The Tenth Circuit further concluded that, under *Hibbs*, the applicability of the TIA turns on "whether the plaintiff's lawsuit seeks to prevent 'the State from exercising its sovereign power to collect revenues,'" regardless of whether the plaintiff is a taxpayer challenging its own state tax liability or, instead, a non-taxpayer group like the DMA. *Id.* at A-15.

The Tenth Circuit also declined to follow two conflicting decisions from other circuits, cited by the DMA in its jurisdictional statement. First, the Court of Appeals conceded that its ruling is at odds with the First Circuit's decision in *United Parcel Service, Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003), *see* App. at A-22, which addressed the limitation on federal court jurisdiction under the Butler Act, 48 U.S.C. § 872, the Puerto Rico analog to the TIA. The Tenth Circuit expressly declined to follow the First Circuit's reasoning that there is no statutory bar to federal court jurisdiction over a suit that "[does] not challenge the amount or validity of [a state] tax, nor the authority of the [state revenue official] to assess or collect it." *See* App. at A-22 (brackets added).

The Tenth Circuit further deemed the Second Circuit's decision in *Wells v.* Malloy, 510 F.2d 74 (2nd Cir. 1975), to be inapplicable. *Id.* at A-23. The Court conceded, as noted by Judge Friendly in *Wells*, that the TIA does not preclude jurisdiction over every suit that seeks to enjoin any state law that "could possibly secure tax payment." *Id.* (citing *Wells*, 510 F.2d at 77). The Tenth Circuit, however, deemed *Wells* to be inapplicable on the ground that the Colorado Act imposes obligations that are intended to promote tax compliance "in the first instance," whereas the state law in *Wells* prescribed a sanction for taxpayers that had failed or refused to pay a tax. *Id.*

5. On September 18, 2013, the DMA filed a petition for rehearing en banc by the Tenth Circuit. On October 1, 2013, the Court of Appeals denied the request. *See* App. D-1 – D-2.

6. On November 5, 2013, the DMA filed suit in Colorado state court in an effort to reestablish the injunction against the Colorado Act before the annual requirements imposed on non-collecting retailers

(*i.e.*, the Annual Purchase Summaries and Customer Information Reports) took effect.

The DMA also elected to pursue a petition for a writ of certiorari from this Court, given the significance to its members of the Tenth Circuit's decision dismissing the case on jurisdictional grounds. On December 19, 2013, the Court granted the DMA an extension of time to file a petition for a writ of certiorari. *See* No. 13A633.

On February 18, 2014, the state District Court for the City and County of Denver granted the DMA's motion for a preliminary injunction and entered an order enjoining enforcement of the Colorado Act. Proceedings in the state court action are ongoing.

REASONS FOR GRANTING THE PETITION

Since its enactment in 1937, the TIA has served as a restriction on the exercise of federal court jurisdiction, consistent with Congressional intent to foreclose federal court challenges brought by taxpayers seeking to circumvent state administrative procedures and remedies for contested state tax assessments. The Tenth Circuit's decision interpreting the TIA to bar federal jurisdiction over the DMA's constitutional challenge to the informational notice and reporting obligations imposed on a defined set of non-taxpayers under a Colorado law which neither imposes a tax, nor requires the collection of a tax, improperly expands the TIA to a lawsuit outside the scope of the jurisdictional limitation intended by Congress. Although the Tenth Circuit purports to follow this Court's authoritative decision in *Hibbs* concerning the intent of Congress in enacting the

TIA, the Tenth Circuit disregards *Hibbs*' teaching. At the same time, the Tenth Circuit expressly rejects the reasoning of the First Circuit in a strikingly similar case, and fails to follow persuasive authority from the Second Circuit interpreting the TIA in light of the same legislative history reviewed by this Court in *Hibbs*. Certiorari is therefore warranted because the decision below presents an important issue of federal court jurisdiction and creates a conflict among the circuits as to the proper application of the TIA to cases challenging secondary elements of state tax administration.

I. THE TENTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S PRECEDENT IN *HIBBS V. WINN* REGARDING THE SCOPE AND INTENT OF THE TIA.

A. Congress Intended The TIA To Apply Solely To Cases, Unlike The DMA's Suit, In Which Liability For State Taxes Is Disputed.

By its terms, the TIA precludes federal court jurisdiction over suits that seek to "enjoin, suspend or restrain the assessment, levy or collection" of state taxes, so long as a plain, speedy and efficient remedy for such a suit exists in a state forum. 28 U.S.C. § 1341. In interpreting the TIA, this Court and lower courts have long looked not only to the language of the Act, but also to the legislative history reflecting Congressional intent underlying the TIA. *See, e.g., Jefferson County v. Acker*, 527 U.S. 423, 434-35 (1999) (noting that, in enacting the TIA, Congress drew in particular on the Anti Injunction Act, 26

U.S.C. § 7421(a)); *Wells*, 510 F.2d at 77 (interpreting the meaning of the term "collection" as used in the TIA in light of its legislative history).

The most recent, and most authoritative, review of the TIA is set forth in this Court's opinion in *Hibbs*. *See Luessenhop v. Clinton County, N.Y.*, 466 F.3d 259, 268 (2nd Cir. 2006) (noting that *Hibbs* represents the "definitive ruling on the proper interpretation of the TIA"). There, the Court reviewed a challenge under the Establishment Clause to an Arizona tax credit for contributions to parochial schools brought by taxpayers who did not qualify for the credit. 542 U.S. at 94-95. The state's Director of Revenue urged that the TIA should be read to foreclose "federal-court interference with all aspects of state tax administration." *Id.* at 105.

The Court undertook a thorough examination of both the legislative history of the TIA and the Court's prior decisions concerning its scope. The Court found that "in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority." 542 U.S. at 104-05. The Court further determined that its own TIA precedents likewise showed that the TIA had been consistently interpreted to apply "only in cases Congress wrote the Act to address, *i.e.*, cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes." *Id.* at 107. These boundaries on the intended scope, and the actual application, of the TIA demonstrate that other types of cases, outside its ambit, are not subject to the TIA's jurisdictional bar.

In this case, the Colorado Act challenged by the DMA neither imposes a tax on affected out-of-state retailers, nor requires them to collect a tax. Rather, the Colorado Act and Regulations impose informational notice and reporting requirements (the Transactional Notice, Annual Purchase Summary, and Customer Information Report) specifically on retailers that are not subject to Colorado sales tax obligations. As a result, the DMA's suit challenging the Act and Regulations does not seek to enjoin, or suspend or restrain the assessment, levy or collection of any state tax. Moreover, the only monetary impositions under the Act and Regulations are substantial penalties levied against non-collecting retailers who fail to comply with the prescribed notice and reporting obligations. It is well-established that a suit challenging the imposition of a penalty is not within the scope of the TIA. *E.g., Chamber of Commerce v. Edmondson*, 594 F.3d 742, 761-64 (10th Cir. 2010); *see also National Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2584 (2012) (federal court jurisdiction to review the penalty provision of the Patient Protection and Affordable Care Act is not foreclosed under Anti-Injunction Act).

In short, the DMA's suit does not contest the Colorado tax liability of its affected members (who are not taxpayers) or of anyone else (namely, the Colorado purchasers who owe the use tax). Indeed, there is no dispute that use tax is due on the purchases made by Colorado consumers. It is the non-tax, notice and reporting obligations imposed on non-collecting retailers under the Act that place the DMA's challenge outside the scope of the TIA, as defined by this Court in *Hibbs.*[2]

B. The Tenth Circuit's Ruling Expands The TIA To Bar Suits Challenging Secondary Aspects Of State Tax Administration.

Because the Colorado Act and Regulations do not themselves impose a tax, or the obligation to collect a tax, it is evident that they are, at most, a secondary aspect of the state's overall scheme for the administration of its taxes. The Tenth Circuit acknowledged that "[e]ven if the DMA's constitutional attack on the notice and reporting obligations were successful, Colorado consumers would still owe use taxes by law." App. at A-18. The Court determined, however, that the TIA applies to the DMA's claims on the grounds that the challenge to the notice and reporting requirements would "restrain" the collection of Colorado use tax from purchasers within the meaning of the TIA. *Id.* ("Although the DMA does not directly challenge a tax, it contests the *way* Colorado wishes to collect a tax.") (italics in original). According to the Tenth Circuit, the TIA applies "both to a lawsuit that would directly enjoin a tax and one that would enjoin a procedure required by the state's tax statutes and regulations that aims to enforce and increase tax collection." *Id.* at A-19.

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[2] It is worth noting that, to the extent there is a state court remedy available to out-of-state retailers for contesting the notice and reporting obligations imposed under the Colorado Act, it is a general declaratory judgment action under the state version of the Uniform Declaratory Judgments Law, Colo. Rev. Stat. § 13-51-101 *et seq.*, and not one "tailormade for taxpayers." *See Hibbs*, 542 U.S. at 107 (TIA's jurisdictional limitation must be read "harmoniously" with the requirement that state law must provide a plain, speedy and efficient remedy "tailormade for taxpayers"). Indeed, the Colorado Act itself contains no provision setting forth a remedy for challenging either the notice and reporting obligations, or the imposition of a penalty for non-compliance. *See generally* Colo. Rev. Stat. §§ 39-21-112(3.5)(c) & (d). The absence of such a specific administrative remedy for challenging the Act further indicates that the Colorado Act is not among the types of state laws that Congress dictated should be challenged only in state court. *Id.* at 104-05 ("in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority").

In *Hibbs*, this Court squarely rejected the argument, advanced by the Arizona Director of Revenue, that the TIA "immunizes from federal review 'all aspects of state tax administration.'" 542 U.S. at 105. The Tenth Circuit acknowledged in the decision below that the TIA is not an outright bar to jurisdiction over all suits related to state tax administration, but dismissed this Court's caution in *Hibbs* regarding over-application of the TIA as describing solely a distinction between federal lawsuits that would not curb state revenue collection, and thus fall outside the TIA, and those that would reduce the flow of revenue to the state, and thus trigger the TIA. App. at A-21. The Tenth Circuit's narrow reading of *Hibbs* ignores the underlying intent of Congress and unduly expands the scope of the TIA.

While focusing on selected dictionary definitions of the word "restrain," the Tenth Circuit fails to address the meaning of the term "collection" as used by

Congress in the TIA. In *Hibbs*, the Court quoted from the Second Circuit's decision in *Wells*, where Judge Friendly concluded that the TIA does *not* extend to suits challenging aspects of state tax administration that would produce state tax revenue only indirectly:

> "The [TIA's] context and the legislative history ... lead us to conclude that, in speaking of 'collection,' Congress was referring to methods similar to assessment and levy, *e.g.*, distress or execution ... that would produce money or other property directly, rather than indirectly through a more general use of coercive power. Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law going to the validity of the particular taxes *imposed upon them* ...."

Hibbs, 542 U.S. at 109 (quoting *Wells*, 510 F.2d at 77) (italics added by the Court). Like the driver's license suspension provision in *Wells*, the notice and reporting obligations imposed on non-collecting retailers under the Colorado Act are nothing more than coercive regulatory measures designed to secure payment of taxes indirectly. In fact, the Transactional Notice and Annual Purchase Summaries of the Act can never result in any "collection" of the use tax in the manner Judge Friendly found Congress intended (*i.e.*, direct methods such as assessment, levy, distress or execution). Although Colorado consumers receiving such notices may choose to self-report and pay the use taxes they owe, in no sense would the notice requirements imposed on non-collecting retailers promote the Department's affirmative efforts to collect the use tax from the consumers, within the meaning of the TIA.

II. THE TENTH CIRCUIT'S DECISION BELOW CONFLICTS WITH AUTHORITATIVE DECISIONS OF THE FIRST AND SECOND CIRCUITS.

A. First Circuit: *United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003).

The Tenth Circuit's ruling that the TIA broadly applies to administrative procedures designed to promote payment of the use tax by consumers also conflicts with the decisions of other Courts of Appeals. In a closely analogous case, the First Circuit rejected the contention that the Butler Act, the Puerto Rico analog to the TIA,[3] bars federal court jurisdiction over a challenge to a law that, like the Colorado Act, sought to compel a third-party to comply with burdensome regulatory requirements related to excise taxes owed by local residents on the interstate shipment of goods. *United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003) ("*UPS*").

The Puerto Rico law challenged by UPS prohibited an interstate commercial air carrier from delivering a package to a recipient in Puerto Rico unless the recipient provided the carrier with a certificate from the Puerto Rico Department of Treasury indicating that the excise tax due on the package's contents was paid. *Id.* at 326. Failure to obtain the certificate subjected the air carrier to fines and to payment of the tax on the package's contents. *Id.* As an alternative to obtaining the certificate, carriers could prepay the taxes due to the Department and seek to collect them from the recipient. *Id.* The prepayment option further required the carriers to comply with a complex statutory scheme akin to federal customs regulations. *Id.* On a daily basis, the carriers were required to provide the Department with an invoice and shipping manifest for each package. The carriers were required to calculate and remit the taxes due from the recipients, and to maintain extensive records regarding prepayment of the taxes. *Id.* at 326-27.

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[3] The Butler Act provides that "[n]o suit for the purpose of restraining the assessment or collection of a tax imposed by the laws of Puerto Rico shall be maintained in the United States District Court for the District of Puerto Rico." 48 U.S.C. § 872.

Adopting a position strikingly similar to the reasoning of the Tenth Circuit in this case, the Puerto Rico Department of Treasury argued that the Butler Act barred federal court jurisdiction because the suit constituted a challenge to the statutory and regulatory mechanism adopted to promote "collection" of the Puerto Rico excise tax. *Id.* at 330. The First Circuit disagreed. The Court noted that "[n]ot every statutory or regulatory obligation that may aid the Secretary's ability to collect tax is immune from attack in federal court." *Id.* at 331. In a passage that might have been written for this case, the First Circuit further explained why the Butler Act did not bar jurisdiction over the suit. The Court noted that UPS "did not challenge the amount or validity of the tax due from consumers, nor the authority of [revenue officials] to assess or collect it." 318 F.3d at 330-31 (brackets added). The Court held that the regulatory provisions adopted by Puerto Rico, which relied on "the threat of sanctions against private parties who do not even owe the tax at issue" to produce tax money indirectly, did not constitute "a system of tax collection" within the meaning of the Butler Act. *Id.* at 331.

In its decision below, the Tenth Circuit expressly declined to follow *UPS*. App. at A-22. The Court found the reasoning of the First Circuit in *UPS* to be "in conflict with our own binding case law," relying on two demonstrably less analogous Tenth Circuit decisions regarding the TIA. *Id.* (citing *Brooks v. Nance*, 801 F.2d 1237, 1239 (10th Cir. 1986) and *Hill v. Kemp*, 478 F.3d 1236, 1249 (10th Cir. 2007), *cert. denied*, 552 U.S. 1096 (2008)). *Brooks* involved a challenge, on civil rights grounds, by two Native American brothers to the seizure by Oklahoma revenue officials of cigarettes offered for sale without tax stamps. 801 F.2d at 1239. The Oklahoma cigarette tax is collected directly from vendors through the distribution by the Tax Commission of stamps to be affixed to the product prior to sale, with cigarettes offered for sale without the stamp subject to seizure. *See* Okla. Stat., tit. 68, §§ 302, 305. The plaintiffs thus directly contested the manner in which the taxes they owed were collected, bringing their civil rights claims squarely within the ambit of the TIA. *Brooks*, 801 F.2d at 1239.

In *Hill*, certain Oklahoma citizens brought a suit seeking, on Establishment Clause grounds, to enjoin Oklahoma laws that allowed motorists to obtain state license plates bearing the messages "Adoption

Creates Families" and "Choose Life." 478 F.3d at 1239-40. The Tenth Circuit determined that the charge assessed to obtain the license plates was a tax within the meaning of the TIA and not a regulatory fee. *Id.* at 1246. The Court further held, despite the fact that the plaintiffs had not chosen to pay for a license plate bearing either message, that their claims were nevertheless subject to the TIA because they sought to enjoin directly a state revenue-raising measure. *Id.* at 1249.

In contrast to the close parallel between *UPS* and this case, neither *Brooks* nor *Hill* presents even remotely analogous issues. Neither case concerned a challenge to burdensome, non-tax regulatory requirements imposed on non-taxpayers that are only indirectly related to a tax due from others. The First Circuit's decision regarding the proper scope of federal jurisdiction in *UPS* is directly on point, and the Tenth Circuit's decision not to follow its reasoning places the ruling below in clear conflict with the First Circuit.

B. Second Circuit: *Wells v. Malloy*, 510 F.2d 74 (2nd Cir. 1975).

The Tenth Circuit's decision is also in conflict with decisions of the Second Circuit Court of Appeals including, most notably, Judge Friendly's decision in *Wells*. There, the Second Circuit reviewed a challenge by a Vermont taxpayer to a statute that allowed the suspension of a motorist's driver's license for failure to pay the excise tax on his vehicle. 510 F.2d at 76. The plaintiff did not dispute that he owed the tax and admitted that he had failed to pay it as a result of financial inability. *Id.* The plaintiff challenged the suspension of his driver's license on the ground that classifying motor vehicle operators based on their payment (or non-payment) of the excise tax violated the Equal Protection Clause of the Fourteenth Amendment. *Id.*

Just as the Tenth Circuit asserts in the decision below, the state defendant in *Wells* argued that the plaintiff was seeking to "restrain the collection" of the state excise tax within the meaning of the TIA. *Id.* at 77. Judge Friendly noted that the term "collection" might be read "broadly to include anything that a state has determined to be a likely method of securing payment," but concluded that in enacting the TIA, Congress had not "intended to go so far." *Id.* Reviewing the same legislative history that the Supreme Court reviewed in *Hibbs*, the Court held that the term "collection," as used in the TIA, was meant to apply to state procedures "that would produce money or other property directly, rather than indirectly through a more general use of coercive power" and *not* to an "unusual sanction for non-payment of a tax admittedly due." *Id.* Although the Vermont statute was plainly intended to generate revenue by compelling payment of the tax, Judge Friendly held that the TIA did not apply. *Id.*

In its decision below, the Tenth Circuit purports to endorse Judge Friendly's conclusion that the TIA does not extend so far as to bar "any action challenging a state law that could possibly secure tax payment." App. at A-23. The Tenth Circuit's own reasoning, however, is at odds with the principle it professes to approve. Earlier in the Tenth Circuit's opinion the Court concludes that the DMA's claims are barred *precisely because* they purport to challenge Colorado's "chosen method to secure [use] taxes." *Id.* at A-18. *Wells* stands for the proposition that the TIA does not prevent a challenge to any and all state measures, however indirect, that are intended to increase taxpayer compliance, but that is precisely the manner in which the Tenth Circuit applied the TIA to the Colorado Act below. Despite the Tenth Circuit's statement that it agrees with the reasoning of *Wells*, the decision below cannot be reconciled with *Wells*' holding.[4]

The Tenth Circuit also strives to distinguish *Wells* on the grounds that it concerned a "punitive" measure imposed on a taxpayer that had refused to pay taxes, in contrast to the Colorado Act, which it describes as outlining measures that "attempt to secure tax compliance in the first instance." *Id.* at A-23. Judge Friendly, however, rejected a similar invitation to parse between "collection" and "enforcement" measures based on the timing of their application, and instead construed the TIA's use of the term "collection" to mean direct revenue raising measures, rather than indirect means of contriving payment. 510 F.2d at 77. The Act and Regulations are, in any event, unquestionably punitive and coercive as to out-of-state retailers, who face significant sanction by the state for electing, consistent with *Quill*, not to collect Colorado use taxes that all parties acknowledge are due from, but may go unpaid by, the Colorado consumers who are obligated to report them.[5]

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[4] The Second Circuit later reaffirmed its reading of the proper scope of the TIA in *Luessenhop v. Clinton County, N.Y.*, a due process challenge to the adequacy of a foreclosure notice given to property taxpayers by local authorities. 466 F.3d at 264-68. Although the language of the TIA might allow multiple interpretations, the Court restated the conclusion reached in *Wells* that the intent of Congress in enacting the TIA was to foreclose federal court jurisdiction to plaintiffs seeking to contest the validity of the taxes imposed upon them, not to prevent the exercise of jurisdiction over all cases that are somehow related, even indirectly, to state tax administration. *Id.* at 264-65 (citing *Wells*, 510 F.2d at 77). The Second Circuit concluded that "dismissing plaintiffs' causes of action because they pertain to state tax administration in the most general sense would be a patent misreading of the TIA." *Id.* at 265.

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[5] The Tenth Circuit's decision also conflicts with decisions in other circuits confirming federal court jurisdiction to enjoin regulatory penalties. The DMA's Complaint sought to have all of the relevant provisions of the Colorado Act and Regulations enjoined—of which the penalty provisions are an integral part. C.A. Appx. 81-82 (*Compl., Prayer for Relief*). Moreover, in its request for a permanent injunction, the DMA specifically referred to the penalty provisions in its discussion of irreparable harm. C.A. Appx. 1723.

Under prevailing law, the portion of the DMA's suit seeking to enjoin the regulatory penalties is not barred by the TIA. For example, the Seventh Circuit in *RTC Commercial Assets Trust 1995-NP3-1 v. Phoenix Bond & Indem. Co.*, 169 F.3d 448 (7th Cir. 1999), affirmed a lower court's decision to exercise jurisdiction over the plaintiff's challenge to the portion of a state tax law that imposed penalties for failure to remit the tax in question. 169 F.3d at 457-58. Under the reasoning of *RTC Commercial*, the portions of the DMA's claims challenging the imposition of penalties against out-of-state retailers for non-compliance with the Colorado Act are plainly not barred by the TIA.

III. THE DOCTRINE OF COMITY DOES NOT APPLY TO FORECLOSE JURISDICTION IN THIS CASE.

The significance of the TIA, and of this Court's definitive decision in *Hibbs* regarding its scope, is sometimes over-shadowed by the "more embracive" doctrine of comity, discussed by the Court in *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 424 (2010). That is not the case here. The Tenth Circuit referenced comity, in a footnote, as an additional factor that "militates in favor of dismissal" of the DMA's claims, App. at A-33 n.11, but the doctrine of comity does not apply, as the reasoning of *Levin* itself makes clear.

The Court in *Levin* found that a "confluence of factors," taken together, dictated dismissal, on comity grounds, of a suit alleging discriminatory treatment of a group of "independent marketers" under Ohio's system for the taxation of natural gas. 560 U.S. at 431. *First*, the Court noted that there was no fundamental Constitutional right or classification subject to heightened scrutiny involved in the taxpayers' challenge. *Id.* *Second*, by complaining about their relative tax burden in comparison to their competitors, the plaintiffs were seeking to enlist the federal courts to improve their competitive position in the Ohio market. *Id.* *Third*, Ohio courts were "better positioned than their federal counterparts" to correct any unconstitutional discrimination resulting under state law, and were not limited by the TIA, as a federal district court would be, in the remedy they could prescribe. *Id.* at 431-32. The Court concluded that "[i]ndividually, these considerations may not compel forbearance on the part of federal district courts; in combination, however, they demand deference to the state adjudicative process." *Id.* at 432.

The Court placed particular emphasis on the third factor as central to the comity analysis, *i.e.*, the existence of alternative possible remedies to achieve equal treatment under the law, pending correction by the state legislature. *Id.* at 427-28. The Court explained that it has traditionally left to state courts upon remand the determination of what form of relief is preferable to remedy unlawful discrimination resulting from unconstitutional state statutes. *Id.* Lower federal courts, however, lack the power to send cases to state courts for decision on the proper remedy, and thus comity principles suggest that federal district courts must refrain from exercising jurisdiction in the first place, where a state court forum is available to plaintiffs. *Id.* at 428.

The principles enunciated by the Court in *Levin* do not lead to the conclusion that the District Court in the present case was required to refrain from exercising its jurisdiction over the DMA's suit as a matter of comity. Most significantly, there is no remedy other than suspension of the Colorado Act's notice and reporting requirements available in response to the DMA's claims. Extending such obligations to in-state, Colorado retailers would be nonsensical, since sales tax collection at the point-of-sale renders use tax reporting by the consumer unnecessary. Nor would such an illogical approach cure the violation alleged by the DMA in Count II, *i.e.,* that the State lacks the power under the Commerce Clause to impose the notice and reporting obligations on out-of-state retailers with no physical presence in the state.

C.A. Appx. at 65-67.[6] In short, "[b]ecause state courts would have no greater leeway than federal courts to cure the alleged violation, nothing would be lost in the currency of comity or state autonomy by permitting" the DMA's claims to be litigated in federal court. *Levin*, 560 U.S. at 431.

Moreover, the other factors identified by the Court in *Levin* are not present here. The DMA is not seeking to enlist the federal courts to "increase a competitor's tax burden." *Levin*, 560 U.S. at 426. The DMA's suit will not, in any respect, alter the tax collection obligations of other retailers, in-state and out-of-state alike, that are required to collect Colorado sales and use taxes. Rather, the DMA's suit seeks to protect its members from discriminatory regulatory obligations that violate the members' constitutional rights and those of its members' customers. Finally, although Commerce Clause rights are not typically considered to be among those classified as "fundamental," discrimination against interstate commerce triggers a form of heightened scrutiny so strict as to result in a virtual *per se* rule of unconstitutionality. *Oregon Waste Sys., Inc. v. Department of*

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[6] Although the DMA's constitutional claims other than its Commerce Clause claims (Counts I and II) were not before the Tenth Circuit, it is worth noting that there could likewise be only one remedy for the DMA's claims for violation of the First Amendment, for intrusion upon the Privacy rights of Colorado consumers, and for the unlawful seizure of retailers' customer list information without due process or just compensation under the Takings Clause. Indeed, extending the Act's requirements to in-state, Colorado retailers would merely expand, not alleviate, these constitutional harms.

Envtl. Quality, 511 U.S. 93, 99 (1994). Such heightened scrutiny militates against declining jurisdiction on comity grounds. *See Levin*, 560 U.S. at 426 (commenting that comity requires deference to states with regard to economic legislation that "does not employ classifications subjected to heightened scrutiny or impinge on fundamental rights"). In short, comity is not a bar to the DMA's suit.

IV. THIS CASE AFFORDS THE COURT THE OPPORTUNITY TO CLARIFY LEGAL DOCTRINE CONCERNING AN ISSUE OF EXCEPTIONAL IMPORTANCE TO THE PROPER EXERCISE OF FEDERAL COURT JURISDICTION.

A writ of certiorari is particularly warranted in this case so that the Court may clarify the limits of TIA's jurisdictional bar with respect to suits challenging secondary aspects of state tax administration. *Bullock v. BankChampaign, N.A.*, 133 S.Ct. 1754, 1761 (2013) ("it is important to have a uniform interpretation of federal law"). Moreover, as Justice Harlan explained, "[c]larity is to be desired in any statute, but in matters of jurisdiction it is especially important. Otherwise the courts and the parties must expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case." *United States v. Sisson*, 399 U.S. 267, 307 (1970).

In the proceedings below, neither the parties, nor the District Court, perceived the TIA to be a bar to federal court jurisdiction over the DMA's claims. The Executive Director did not move to dismiss the DMA's Commerce Clause counts on TIA grounds, and subsequently informed the Court of Appeals that the TIA did not foreclose its exercise of jurisdiction over the appeal. Appellant's Brief at 31 n. 3. The DMA, for its part, has consistently asserted that the TIA does not apply. Perhaps most significantly, the District Court did not perceive the TIA to be an obstacle to its exercise of jurisdiction over the DMA's claims, determining on summary judgment that the Colorado Act and Regulations, on their face, violate the Commerce Clause.

Together, the parties and the District Court expended substantial resources litigating to conclusion the DMA's Commerce Clause claims. More than three years after the DMA filed suit, and some 31 months after the District Court first suspended enforcement of the Colorado Act, the Tenth Circuit determined that federal court never had jurisdiction over the DMA's claims. As even the Tenth Circuit acknowledged, however, the DMA's suit does not present the "prototypical TIA case." App. at A-18. Issuance of a writ of certiorari will allow the Court to provide guidance to litigants, including both private parties and state officials, as well as to lower courts, concerning the proper application on the TIA, so that future cases presenting important constitutional questions on the merits can be resolved without undue delay and confusion regarding jurisdictional matters.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 25, 2014

Counsel for Petitioner

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

DIRECT MARKETING ASSOCIATION,
Plaintiff – Appellee,

v. No. 12-1175

BARBARA BROHL, in her capacity as
Executive Director, Colorado Department
of Revenue,
Defendant – Appellant,

and

MULTISTATE TAX COMMISSION,
Amicus – Curiae.

August 20, 2013

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. NO. 1:10-CV-01546-REB-CBS)

Melanie J. Snyder, Deputy Attorney General (John W. Suthers, Attorney General; Daniel D. Domenico, Solicitor General; Stephanie Lindquist Scoville, Senior Assistant Attorney General; and Grant T. Sullivan, Assistant Attorney General, with her on the briefs, Denver, Colorado, appearing for Appellant.

George S. Isaacson (Matthew P. Schaefer with him on the briefs), Brann & Isaacson, Lewiston, Maine, appearing for Appellee.

Sheldon Laskin, Counsel, and Shirley Sicilian, General Counsel, Washington, D.C., filed an amicus curiae brief on behalf of Multistate Tax Commission.

Before **BRISCOE**, Chief Judge, **GORSUCH** and **MATHESON**, Circuit Judges.

MATHESON, Circuit Judge.

This appeal arises from Colorado's efforts to collect sales and use taxes during the expansion of e-commerce.

Appellant Barbara Brohl, Executive Director of the Colorado Department of Revenue (the "Department"), appeals from an order enjoining the enforcement of state notice and reporting requirements imposed on retailers who do not collect taxes on sales to Colorado purchasers ("non-collecting retailers"). Most, if not all, of these non-collecting retailers sell products to Colorado purchasers by mail or online.

Appellee Direct Marketing Association ("DMA")—a group of businesses and organizations that market products via catalogs, advertisements, broadcast media, and the Internet—urges us to uphold the district court's determination that Colorado's notice and reporting obligations are unconstitutional. The district court concluded that Colorado's requirements for non-collecting retailers discriminated against and placed undue burdens on interstate commerce, in violation of the Commerce Clause of the United States Constitution. It therefore entered a permanent injunction prohibiting enforcement of the state requirements.

The issue in this appeal is whether Colorado's notice and reporting obligations for non-collecting retailers violate the Commerce Clause. However, we do not reach that merits question. Because the Tax Injunction Act, 28 U.S.C. § 1341, deprived the district court of jurisdiction to enjoin Colorado's tax collection effort, we remand to the district court to dismiss DMA's Commerce Clause claims.

I. BACKGROUND

A. *Colorado's Sales and Use Taxes*

Colorado imposes a 2.9 percent tax on the sale of tangible goods within the state. Colo. Rev. Stat. §§ 39-26-104(1)(a), 106(1)(a)(II). Retailers with a physical presence in the state are required by law to collect sales tax from purchasers[1] and remit it to the Department. *Id.* § 39-26-105, 106(2)(a). The sales tax statute imposes additional duties on Colorado retailers such as recordkeeping, *id.* § 39-26-116, and penalties for deficient remittance of sales tax, *id.* § 39-26-115.

If Colorado purchasers have not paid sales tax on tangible goods—as occurs in some online and mail-order purchases from retailers with no in-state physical presence—they must pay a 2.9 percent use tax "for the privilege of storing, using, or consuming" the goods in Colorado. *Id.* § 39-26-202(1)(b). The use tax complements the sales tax and is designed to "prevent[ ] consumers of retail products from purchasing out of state in order to avoid paying a Colorado sales tax." *Walgreen Co. v. Charnes*, 819 P.2d 1039, 1043 (Colo. 1991) (en banc); *see also Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 66 (1963) ("[T]he purpose of a sales-use tax scheme is to make all tangible property used or consumed in [a] State subject to a uniform tax burden irrespective of whether it is acquired within the State.").

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[1] We use the terms "purchasers," "consumers," and "customers" interchangeably.

Although Colorado's sales and use taxes have equivalent rates, they are collected differently. Whereas retailers with a physical presence in the state must collect and remit sales tax to the Department, the onus is on the purchaser to report and pay use tax. *See J.A. Tobin Const. Co. v. Weed*, 407 P.2d 350, 353 (Colo. 1965) (en banc). This difference results from the Supreme Court's bright-line rule in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). In *Quill*, the Court reaffirmed that it is unconstitutional under the "negative" or "dormant" aspect of the Commerce Clause for a state to require a retailer with no in-state presence to collect the state's sales or use taxes. *Id.* at 315-18 (reaffirming Commerce Clause holding in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967)). Because *Quill* prohibits Colorado from forcing retailers with no in-state physical presence to collect and remit taxes on sales to Colorado consumers, the state requires its residents to report and pay use taxes to the Department with their income tax returns. *See* Colo. Rev. Stat. § 39-26-204(1)(b). The failure to report and pay use tax is a criminal offense. *Id.* § 39-26-206; *id.* § 39-21-118.

Nonetheless, use tax collection is elusive. Most Colorado residents do not report or remit use tax despite the legal obligation to do so. A 2010 report submitted as part of this litigation estimated that Colorado state and local governments would lose $172.7 million in 2012 because of residents' failure to pay use tax on e-commerce purchases from out-of-state, non-collecting retailers.

B. *Notice and Reporting Requirements*

To increase use tax collection, in 2010 the Colorado legislature enacted statutory requirements for non-collecting retailers.[2] The statute and its implementing regulations impose three principal obligations on non-collecting retailers whose gross sales in Colorado exceed $100,000: they must (1) provide transactional notices to Colorado purchasers, (2) send annual purchase summaries to Colorado customers, and (3) annually report Colorado purchaser information to the Department.

Under the first requirement, non-collecting retailers must "notify Colorado purchasers that sales or use tax is due on certain purchases and that the state of Colorado requires the purchaser to file a sales or use tax return." Colo. Rev. Stat. 39-21-112(3.5)(c)(I). The notice must be included in every transaction with a Colorado purchaser, 1 Colo. Code Regs. § 201-1:39-21-112.3.5(2)(a), and shall inform the purchaser that (1) the retailer has not collected sales or use tax, (2) the purchase is not exempt from Colorado sales or use tax, and (3) Colorado law requires the purchaser to file a sales or use tax return and to pay tax owed. *Id.* § 201-1:39-21-112.35(2)(b).[3] According to the Department, the transactional notice "serves to educate consumers about their state use tax liability with the aim of increasing voluntary compliance." Aplt. Br. at 12.

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[2] A "non-collecting retailer" is defined as "[a] retailer that sells goods to Colorado purchasers and that does not collect Colorado sales or use tax." 1 Colo. Code Regs. § 201-1:39-21-112.3.5(1)(a)(i). Non-collecting retailers who made less than $100,000 in total gross sales in Colorado in the previous calendar year, and who reasonably expect gross sales in the current calendar year to be less than $100,000, are exempt from the notice and reporting obligations. *Id.* § 201-1:39-21-112.3.5(1)(a)(iii).

Under the second requirement, non-collecting retailers must mail annual notices to Colorado customers who purchased more than $500 in goods from them in the preceding calendar year. 1 Colo. Code Regs. § 201-1:39-21-112.3.5(3)(a), (c). The summary must be sent by January 31 of each year and the envelope containing it must be "prominently marked with the words 'Important tax document enclosed.'" *Id.* § 201-1:39-21-112.3.5(3)(a)(i), (vi). The summary must inform Colorado consumers of purchase dates, items bought, and the amount of each purchase made in the preceding calendar year. *Id.* § 201-1:39-21-112.3.5(3)(a)(ii). The annual summary tells purchasers they have a duty to "file a sales or use tax return at the end of every year" in Colorado and must inform customers that the retailer is required to report to the Department the customers' total purchase amounts from the preceding calendar year. *Id.* § 201-1:39-21-112.3.5(3)(a)(iii), (iv). According to the Department, the annual summary "arms the consumer with accurate information to facilitate reporting and paying the use tax." Aplt. Br. at 13.

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[3] Non-collecting retailers may provide a more generalized notice if they are required to comply with a similar practice in another state. *Id.* § 201-1:39-21-112.3.5(2)(e). The transactional notice also may take the form of a prominent link during an online purchase that states, "See important sales tax information regarding the tax you may owe directly to your state." *Id.* § 201-1:39-21-112.3.5(2)(d).

Third, non-collecting retailers must annually report information on Colorado purchasers to the Department. Colo. Rev. Stat. § 39-21-112(3.5)(d)(II)(A). The annual report shall include purchasers' names, billing addresses, shipping addresses, and total purchase amounts for the previous calendar year. 1 Colo. Code Regs. § 201-1:39-21-112.3.5(4)(a). According to the Department, this customer information report "allows [it] to pursue audit and collection actions against taxpayers who fail to pay the tax" and "is designed to increase voluntary consumer compliance with state tax laws because consumers know that a third party has reported their taxable activity to the taxing authority." Aplt. Br. at 13.

Non-collecting retailers who do not comply with any one of Colorado's notice and reporting obligations are subject to penalties. Colo. Rev. Stat. § 39-21-112(3.5)(c)(II), (d)(III)(A)-(B). Alternatively, retailers may choose to collect and remit sales tax from Colorado purchasers to forgo the notice and reporting obligations.

C. *Procedural History*

In June 2010, DMA sued the Department's executive director,[4] challenging the constitutionality of Colorado's notice and reporting requirements. Claims I and II of DMA's complaint alleged that Colorado's statutory and regulatory obligations are unconstitutional under the Commerce Clause because they (1) discriminate against interstate commerce ("Discrimination Claim"), and (2) impose undue burdens on interstate commerce ("Undue Burden Claim").[5]

The district court granted DMA a preliminary injunction prohibiting the enforcement of the notice and reporting requirements. The parties then agreed to an expedited process for resolving the two Commerce Clause claims and filed cross-motions for summary judgment on those claims.

On March 30, 2012, the district court granted DMA's motion for summary judgment and denied the Department's motion for summary judgment. On the Discrimination Claim, the court concluded that the notice and reporting requirements facially discriminate against interstate commerce. It held these requirements are unconstitutional because "[t]he record contains essentially no evidence to show that the legitimate interests advanced by the

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[4] At the time, the executive director was Roxy Huber. Ms. Brohl was later substituted as the defendant in this litigation.

[5] DMA's First Amended Complaint asserted six other claims under the United States and Colorado Constitutions. The district court stayed these claims pending the resolution of Claims I and II. Only Claims I and II are before this court on appeal.

[Department] cannot be served adequately by reasonable nondiscriminatory alternatives." *Direct Mktg. Ass'n v. Huber,* No. 10-CV-01546-REB-CBS, 2012 WL 1079175, at *6 (D. Colo. Mar. 30, 2012).

On the Undue Burden Claim, the district court relied on *Quill's* bright-line rule that state governments cannot constitutionally require businesses without an in-state physical presence to collect and remit sales or use taxes. The district court acknowledged that Colorado's notice and reporting requirements do not obligate out-of-state retailers to collect and remit taxes. But it reasoned that the notice and reporting requirements place burdens on out-of-state retailers that "are inextricably related in kind and purpose to the burdens condemned in *Quill*." *Id.* at *8. These burdens, the district court concluded, would unconstitutionally interfere with interstate commerce.

In the same order, the court entered a permanent injunction prohibiting enforcement of the notice and reporting requirements. In granting injunctive relief, the district court said DMA had achieved actual success on the merits because the court had granted summary judgment on the Discrimination and Undue Burden Claims.

Because DMA's non-Commerce Clause claims remained unresolved, the district court said it would "address in a separate order the parties' request that [it] certify this order as a final judgment under Fed. R. Civ. P 54(b)," from which the Department could appeal. *Id.* at *11; *see also* 28 U.S.C. § 1291. However, the Department filed its notice of appeal before the district court certified the order as final under Fed. R. Civ. P. 54(b). We nevertheless may consider the Department's appeal from the district court's entry of a permanent injunction under 28 U.S.C. § 1292(a)(1) (providing jurisdiction over interlocutory orders granting injunctions).

II. DISCUSSION

The issue on appeal is whether Colorado's notice and reporting requirements for non-collecting retailers violate the dormant Commerce Clause. Before addressing that issue, however, we must determine whether the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, precludes federal jurisdiction over DMA's claims. We conclude that it does and do not reach the merits of this appeal.

A. *Tax Injunction Act*

The TIA provides that "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. "The statute has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981) (quotations omitted). It therefore serves as a "broad jurisdictional barrier" that "limit[s] drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Arkansas v. Farm Credit Servs. of Cent. Ark.,* 520 U.S. 821, 825, 826 (1997). Because the TIA is a jurisdictional limitation, we must determine whether it prohibits our consideration of this appeal regardless of whether it was raised in the district court. *See Oklahoma ex rel. Okla. Tax*

Comm'n v. Int'l Registration Plan, Inc., 455 F.3d 1107, 1111 (10th Cir. 2006); *see also Folio v. City of Clarksburg*, 134 F.3d 1211, 1214 (4th Cir. 1998) ("This statutory provision is a jurisdictional bar that is not subject to waiver, and the federal courts are duty-bound to investigate the application of the Tax Injunction Act regardless of whether the parties raise it as an issue.").

The TIA prohibits our jurisdiction if (1) DMA's action seeks to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law," 28 U.S.C. § 1341, and (2) "a plain, speedy and efficient remedy may be had in the courts of such State," *id.* We address these issues in turn.

1. Does DMA seek to enjoin, suspend, or restrain the assessment, levy or collection of a state tax?

The TIA divests federal district courts of jurisdiction over actions that seek to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." 28 U.S.C. § 1341. This broad language prohibits federal courts from interfering with state tax administration through injunctive relief, declaratory relief, or damages awards. *See California v. Grace Brethren Church*, 457 U.S. 393, 407-08 (1982); *Marcus v. Kan. Dep't of Revenue*, 170 F.3d 1305, 1309 (10th Cir. 1999). The TIA "does not limit any substantive rights to enjoin a state tax but requires only that they be enforced in a state court rather than a federal court." *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722, 725 (7th Cir. 2011).

In its brief, DMA argues the TIA does not preclude federal jurisdiction here because DMA (1) is not a taxpayer seeking to avoid a tax, and (2) challenges notices and reporting requirements, not a tax assessment.

a. *Non-taxpayer lawsuits*

DMA argues it is not a taxpayer seeking to avoid state taxes and thus the TIA does not apply. Its argument rests on *Hibbs v. Winn*, 542 U.S. 88 (2004), where the Supreme Court stated that the TIA is triggered when "state taxpayers seek federal-court orders enabling them to avoid paying state taxes." *Id.* at 107. Relying on our precedent interpreting *Hibbs,* we disagree that the TIA applies only when taxpayers seek to avoid a state tax in federal court.

The plaintiffs in *Hibbs* were Arizona taxpayers who brought an Establishment Clause challenge in federal court to a state tax credit for contributions to "school tuition organizations." *Id.* at 94-95. The plaintiffs did not challenge a tax imposed on them, but a tax benefit to others. *Id.* at 108. The Supreme Court determined the TIA did not bar such a lawsuit.

The Court observed that Congress enacted the TIA to "direct[ ] taxpayers to pursue refund suits instead of attempting to restrain [state tax] collections" through federal lawsuits. *Id.* at 104. "In short," the Court said, "Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority." *Id.* at 104-05.

Beyond this discussion of taxpayer lawsuits, the *Hibbs* Court explained that the TIA applies to federal court relief that "would operate[ ] to reduce the flow of state tax revenue"—i.e., federal lawsuits that would inhibit state tax assessment, levy, or collection. *Id.* at 106. According to the statute's legislative history, Congress enacted the TIA with "state-revenue-protective objectives," including prohibiting "taxpayers, with the aid of a federal injunction, from withholding large sums, thereby disrupting state government finances." *Id.* at 104; *see also id.* at 105 n.7 ("The TIA proscribes interference only with those aspects of state tax regimes that are needed to produce revenue—i.e., assessment, levy, and collection."). The court noted that the *Hibbs* plaintiffs did not challenge a state-revenue-producing measure—they sought to invalidate a *tax credit* the state gave to taxpayers—and that nothing in the TIA prohibited a third party from challenging a state tax benefit in federal court. *See id.* at 107-08.

Although *Hibbs* states that the TIA applies to "cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes," *id.* at 107, we have not interpreted it as holding that the TIA applies only to taxpayer suits. For instance, in *Hill v. Kemp,* 478 F.3d 1236 (10th Cir. 2007), we applied the TIA outside the context of a taxpayer seeking to avoid taxes. In *Hill*, Oklahoma motorists and abortion-rights supporters sought to enjoin Oklahoma's statutory scheme for specialty vehicle license plates. *Id.* at 1239. The plaintiffs argued that Oklahoma unconstitutionally discriminated against their viewpoint by giving more favorable terms and conditions to drivers who wanted specialty plates with anti-abortion messages. *Id.*

We agreed with the district court that the TIA barred the plaintiffs' challenge because Oklahoma's specialty license plate scheme imposed revenue-generating changes, which we viewed as taxes. *Id.* at 1244-45. To enjoin the "entire specialty plate regime or even to enjoin a portion of it," we said, "would deny Oklahoma the use of significant funds" used for a variety of state initiatives. *Id.* at 1247. Such a result "would implicate exactly the sort of federalism problems the TIA was designed to ameliorate." *Id.; see also Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976) ("[T]he statute has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations.").

The plaintiffs in *Hill* argued that, under *Hibbs*, the TIA did not apply because they did not challenge an assessment imposed on them, but rather assessments imposed on and paid by other persons or entities"—i.e., they were not taxpayers trying to avoid a tax. 478 F.3d at 1249. We disagreed with this reading of *Hibbs*. We saw "[n]othing in the language of the TIA indicat[ing] that our jurisdiction to hear challenges to state taxes can be turned like a spigot, off when brought by taxpayers challenging their own liabilities and on when brought by third parties challenging the liabilities of others." *Id.*

We acknowledged that in *Hibbs* the Court "did point out that TIA cases typically involve challenges brought by state taxpayers seeking to avoid their own state tax liabilities." *Id.* But we noted that some lower-court cases applied the TIA to suits by third parties who sought to disrupt state tax collection and that the *Hibbs* Court did not criticize these decisions. *Id.* at 1249 & n.11 (citing *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 132 (4th Cir. 2000)). We interpreted *Hibbs* as holding that the "essential problem with the defendant's assertion that the TIA barred the suit lay in the fact that the plaintiffs[s] simply did not seek to enjoin the *levy or collection of any tax* but instead sought to challenge the *provision of a tax credit.*" *Id.* at 1249. The upshot of *Hibbs*, we said, is that "giving away a tax credit is a very different thing than assessing, levying or collecting a tax." *Id.* at 1249. The nature of the plaintiff was not the "essential and dispositive distinction under the Supreme Court's teaching in *Hibbs.*" *Id.*

Accordingly, we have not interpreted *Hibbs* as holding that the TIA applies only when taxpayers seek to avoid a state tax. Rather, the key question is whether the plaintiff's lawsuit seeks to prevent "the State from exercising its sovereign power to collect revenues." *Id.*[6] This interpretation adheres to *Hibbs's* instruction that the primary purpose of the TIA is to "shield[ ] state tax collections from federal-court restraints." 542 U.S. at 104; *see also Ashton v. Cory*, 780 F.2d 816, 822 (9th Cir. 1986) ("The Supreme Court has repeatedly stated that the principal purpose of the Tax Injunction Act was to curtail federal court interference with state revenue collection procedures.").

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[6] In *Hill*, we stated that our understanding of *Hibbs* accords with the views expressed by the Fifth Circuit." 478 F.3d at 1249 n.12. We cited *Henderson v. Stalder*, 407 F.3d 351 (5th Cir. 2005). In *Henderson*, the Fifth Circuit explained that "*Hibbs* opened the federal courthouse doors slightly notwithstanding the limits of the TIA, but it did so only where (1) a third party (not the taxpayer) files suit, *and* (2) the suit's success will enrich, not deplete, the government entity's coffers." *Id.* at 359 (emphasis added). In other words, if a non-taxpayer challenges a tax measure but its challenge would deplete state revenues, *Hibbs* does not prevent the TIA's application.

Contrary to DMA's position, it cannot avoid the TIA merely because it is not a taxpayer challenging tax payment.

b. *Notice and reporting obligations*

DMA next argues that it seeks to avoid notice and reporting obligations, not a tax. It insists that "[t]he fact that such obligations relate to use tax owed by Colorado consumers does not bring the DMA's suit. under the umbrella of the TIA as a suit seeking to enjoin the collection of a state tax." Aplee. Br. at 4.

But the TIA bars more than suits that would enjoin tax collection. It also prohibits federal lawsuits that would "*restrain* the collection" of a state tax. 28 U.S.C. § 1341 (emphasis added). The issue is whether DMA's attack on Colorado's notice and reporting obligations would "restrain" Colorado's tax collection.

i. Suits that restrain tax collection

In enacting the TIA, Congress chose to prohibit three forms of interference with state tax collection: "enjoin[ing], suspend[ing], or restrain[ing.]" *Id.* Its use of the disjunctive "or" suggests each term has a distinct meaning. *See Garcia v. United States,* 469 U.S. 70, 73 (1984) ("Canons of construction indicate that terms connected in the disjunctive be given separate meanings."). The terms "enjoin" and "suspend" suggest entirely arresting tax collection, but "restrain" has a broader ordinary meaning. *See Smith v. United States,* 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.").

Under most definitions, "restrain" means to limit, restrict, or hold back. *See* Webster's Third New International Dictionary 1936 (1976) (defining "restrain" as "to limit or restrict a particular action or course" and "to moderate or limit the force, effect, development, or full exercise of"); American Heritage Dictionary of the English Language 1497 (2011) (defining "restrain" as "[t]o hold back or keep in check"); *see also* Black's Law Dictionary 1429 (9th ed. 2009) (defining "restrain" as "[c]onfinement, abridgment, or limitation"). We accept this ordinary meaning of "restrain," cognizant of the Supreme Court's instruction that the TIA is a broad jurisdictional prohibition. *See Farm Credit Servs.*, 520 U.S. at 825; *Rosewell*, 450 U.S. at 524; *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 470 (1976); *see also Brooks v. Nance*, 801 F.2d 1237, 1239 (10th Cir. 1986); *Gasparo v. City of New York*, 16 F. Supp. 2d 198, 216 (E.D.N.Y. 1998) (The TIA "has not been narrowly construed, but rather constitutes a broad restriction on federal court jurisdiction." (quotations omitted)).

A lawsuit seeking to enjoin state laws enacted to ensure compliance with and increase use tax collection, like DMA's challenge here, would "restrain" state tax collection. Such a lawsuit, if successful, would limit, restrict, or hold back the state's chosen method of enforcing its tax laws and generating revenue. Federalism concerns, which the TIA seeks to avoid, arise not only when a state tax is challenged in federal court, but also when the means for collecting a state tax are targeted there. The TIA's use of the term "restrain" allows federal courts to weed out lawsuits, such as DMA's, that attempt to undermine state tax collection.

Although the DMA does not directly challenge a tax, it contests the *way* Colorado wishes to collect use tax. This court has said that the TIA "cannot be avoided by an attack on the administration of a tax as opposed to the validity of the tax itself." *Brooks,* 801 F.2d at 1239. In making this statement, we agreed with *Czajkowski v. Illinois*, 460 F. Supp. 1265 (N.D. Ill. 1977), which applied the TIA to a challenge to state cigarette tax enforcement, even though it was "arguable that plaintiffs [were] only seeking to enjoin the state from using unconstitutional methods and procedures to collect the taxes, rather than the collection of taxes itself." *Id.* at 1272.

We acknowledge that DMA's suit is unlike TIA cases in which a plaintiff asks a federal court to invalidate and enjoin a state tax. Even if DMA's constitutional attack on the notice and reporting obligations were successful, Colorado consumers would still owe use taxes by law. But the state-chosen method to secure those taxes would be compromised, curbing Colorado's ability to collect revenue. The inquiry under the TIA is whether DMA's lawsuit would *restrain* state tax collection. Although DMA's lawsuit differs from the prototypical TIA case, its potential to restrain tax collection triggers the jurisdictional bar.

DMA suggests that the obligations imposed on non-collecting retailers merely "relate to use tax owed by Colorado consumers." Aplee. Br. at 4. We disagree with DMA's characterization and attempt to distance the notice and reporting obligations from the collection of a state tax. Colorado enacted the notice and reporting obligations to increase taxpayers' compliance with use tax laws and thereby increase use tax collection. Even the title of the bill that later became law reflects its tax collection purpose: "An Act Concerning the *Collection of Sales and Use Taxes* on Sales Made by Out-of-State Retailers." *Id.* at 5 (emphasis added). One of the challenged requirements, the annual customer information reports sent to the Department, would aid the Department's auditing of taxpayers, a significant tax collection mechanism. Indeed, the tax collection goal of the notice and reporting requirements is apparent because out-of-state retailers who voluntarily collect tax on Colorado purchases are exempt.

The purposes of the TIA apply both to a lawsuit that would directly enjoin a tax and one that would enjoin a procedure required by the state's tax statutes and regulations that aims to enforce and increase tax collection. Either action interferes with state revenue collection and falls within the "traditional heartland of TIA cases" that dismiss federal lawsuits to protect state coffers. *Hill*, 478 F.3d at 1250; *see also Brooks*, 801 F.2d at 1239 (the TIA "cannot be avoided by an attack on the administration of a tax as opposed to the validity of the tax itself"); *Jerron W., Inc. v. State of Cal., State Bd. of Equalization*, 129 F.3d 1334, 1337 (9th Cir. 1997) (applying the TIA to an action seeking to enjoin a hearing and administrative proceedings that were integral to the state's sales tax assessment and collection scheme).

Other courts have applied the TIA to attacks on tax collection methods, rather than taxes themselves. In *Gass v. County of Allegheny*, 371 F.3d 134 (3d Cir. 2004), the Third Circuit held that the TIA barred a lawsuit challenging a state tax appeals procedure. Although the appellant argued that its lawsuit did not affect the state's ability to collect tax, the appellate court concluded that the "appeal process is directed to the ultimate goal and responsibility of determining the proper amount of tax to assess" and thus fell within the TIA. *Id.* at 136.

Similarly, the Ninth Circuit has applied the TIA to bar a suit that would have prohibited disclosure of tax information to state taxing authorities. *Blangeres v. Burlington N., Inc.,* 872 F.2d 327, 328 (9th Cir. 1989) (per curiam). The lawsuit sought to withhold "earnings records and other tax-related information to the Idaho and Montana taxing authorities." *Id.* As here, the taxpayer would have continued to owe tax, but the states would have been deprived of the means to calculate and collect it. The Ninth Circuit said, "[t]he fact that the injunction would restrain assessment indirectly rather than directly does not make the [TIA] inapplicable." *Id.*; *see also RTC Commercial Assets Trust 1995-NP3-1 v. Phoenix Bond & Indem. Co.,* 169 F.3d 448, 454 (7th Cir. 1999) ("[T]he TIA withdraws federal jurisdiction even over actions that would indirectly restrain the assessment, levy, or collection of taxes."). The Ninth Circuit has since explained that whether the TIA applies depends on "the *effect* of federal litigation on the state's ability to collect revenue." *Winn v. Killian*, 307 F.3d 1011, 1017 (9th Cir. 2002), *aff'd sub nom. Hibbs*, 542 U.S. 88. We have little problem concluding that DMA's lawsuit would hamper Colorado's ability to raise revenue.

ii. DMA's additional arguments

DMA responds that the Supreme Court has cautioned that the TIA is not a "sweeping congressional direction to prevent federal-court interference with all aspects of state tax administration." *Hibbs*, 542 U.S. at 105. We have acknowledged this point, *see Chamber of Commerce v. Edmondson*, 594 F.3d 742, 761 (10th Cir. 2010), and continue to do so here. But in making this pronouncement, the Supreme Court was distinguishing between federal lawsuits that would not curb state revenue collection, and therefore would not fall within the TIA, and "[f]ederal-court relief [that] [would] reduce the flow of state tax revenue," and thus trigger the TIA. *Hibbs*, 542 U.S. at 106. DMA's Commerce Clause claims fall within the latter category.

DMA also cites two federal circuit court cases to argue that our interpretation of the TIA is overly broad: *United Parcel Service Inc. v. Flores-Galarza ("UPS")*, 318 F.3d 323, 330-32 (1st Cir. 2003), and *Wells v. Malloy*, 510 F.2d 74, 77 (2d Cir. 1975).

In *UPS*, the First Circuit addressed whether the Butler Act, a close relative of the TIA, deprived it of jurisdiction over a challenge to Puerto Rico's interstate package delivery scheme. The Butler Act provides that "[n]o suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the United States District Court for the District of Puerto Rico." 48 U.S.C. § 872. UPS challenged Puerto Rico's statutory scheme prohibiting an interstate carrier from delivering a package unless the recipient presented a certificate of excise tax payment. *See UPS*, 318 F.3d at 326. Alternatively, interstate carriers could prepay excise tax and seek reimbursement from package recipients, but this option imposed expensive and burdensome statutory and regulatory obligations. *Id.*

The First Circuit determined the Butler Act did not bar UPS's action. It reasoned that "UPS sought to enjoin only those provisions that prohibit or interfere with the delivery of packages. UPS did not challenge the amount or validity of the excise tax, nor the authority of the Secretary to assess or collect it." *Id.* at 330-31. The court also said that Puerto Rico's package "delivery ban targets third parties instead of those who owe the tax." *Id.* at 331. It found that Puerto Rico's laws produced excise tax revenue "indirectly through a more general use of coercive power" and did not create "a system of tax collection within the meaning of the Butler Act." *Id.* (quotations omitted).

Even if *UPS* counsels against applying the TIA here, we decline to follow it. Much of *UPS*'s reasoning conflicts with our own binding case law. For instance, *UPS* found it important that the plaintiff did "not challenge the amount or validity of the excise tax," *id.* at 330-31, but we have said the TIA "cannot be avoided by an attack on the administration of a tax as opposed to the validity of the tax itself." *Brooks*, 801 F.2d at 1239. The *UPS* court also declined to apply the Butler Act because Puerto Rico's laws targeted third parties, not taxpayers. But, as discussed above, we recognized in *Hill* that the TIA can apply to third-party lawsuits that enjoin, suspend, or restrain tax collection. *See* 478 F.3d at 1249. Indeed, much of the reasoning in *UPS* would have counseled against applying the TIA to the license plate lawsuit in *Hill*.

DMA also cites *Wells v. Malloy*, 510 F.2d 74, 77 (2d Cir. 1975) (Friendly, J.). In *Wells*, the plaintiff sought to enjoin a Vermont provision that required suspension of his driver's license for failure to pay motor vehicle taxes. *Id.* at 76. The plaintiff did not dispute owing taxes. *Id.* The district court determined the TIA barred the action, but the Second Circuit disagreed.

The court concluded the plaintiff was not seeking to restrain the collection of a tax. It said, "'Collection,' of course, could be read broadly to include anything that a state has determined to be a likely method of securing payment." *Id.* at 77. But the court interpreted "collection" to mean "methods similar to assessment and levy that would produce money or other property directly, rather than indirectly through a more general use of coercive power." *Id.*

Like *Wells*, we do not interpret the TIA as applying to any action challenging a state law that could possibly secure tax payment. But here DMA challenges laws enacted to notify consumers of their duty to pay tax and to garner information on consumer purchases to ensure tax compliance through audits. Its lawsuit targets measures that attempt to ensure tax compliance in the first instance, not sanctions imposed after a taxpayer has admittedly refused to pay taxes. Colorado's laws are not a reactive and punitive "general use of coercive power" to entice tax payment from individuals who admittedly refuse to pay, and we therefore do not think *Wells* applies here.

Finally, we mention one recent development. After oral argument in this case, this court considered the application of the Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421, in ***Hobby Lobby Stores, Inc. v. Sebelius***, -- F.3d --, 2013 WL 3216103 (10th Cir. June 27, 2013) (en banc). Using somewhat similar language to the TIA, the AIA states that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). Whereas the TIA protects state tax measures, the AIA "protects the [federal] Government's ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2582 (2012).

In *Hobby Lobby*, two corporations challenged a federal requirement that they provide employees with health insurance coverage for certain contraceptive methods. 2013 WL 3216103 at *1. Failure to comply with the federal requirement exposed the corporations to a "tax" under 26 U.S.C. § 4980. *Id.* at *7. We considered whether the AIA barred the corporations' action because their suit might enjoin a tax on them for non-compliance with the health care coverage requirement.

We explained that the corporations were "not seeking to enjoin the collection of taxes or the execution of any IRS regulation; they [were] seeking to enjoin the enforcement, by whatever method, of one HHS regulation" regarding contraceptive coverage. *Id.; see also id.* ("[T]he corporations' suit is not challenging the IRS's ability to collect taxes."). The "tax [was] just one of many collateral consequences" of non-compliance with the federal contraceptive-coverage requirement. *Id.* Moreover, "[t]he statutory scheme ma[de] clear that the tax at issue [was] no more than a penalty for violating regulations and the AIA does not apply to the exaction of a purely regulatory tax." *Id.* at *8 (quotations omitted).[7]

Our position in this appeal is consistent with the analysis in *Hobby Lobby*. The corporations in *Hobby Lobby* challenged a health insurance regulation and a possible penalty for failing to comply with that regulation. To the extent that the penalty constituted a "tax" under the AIA, an issue that this court seemed to doubt in *Hobby Lobby*, it was a "more general use of coercive power," *Wells*, 510 F.2d at 77, and fell outside the bounds of the AIA.

Here, DMA challenges notice and reporting requirements in Colorado's sales and use tax statutory scheme. These requirements are not a coercive use of power or punitive in nature—they are the state's chosen means of enforcing use tax collection in the first instance. And the state's use tax is indisputably a "tax" under the TIA. The revenue-generating, non-punitive purpose of the notice and reporting obligations places them squarely within the TIA's protection.

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[7] In using the term "regulatory tax," the *Hobby Lobby* court appears to have drawn a distinction between a "classic tax [that] sustains the essential flow of revenue to the government," *Marcus v. Kan. Dep't of Rev.*, 170 F.3d 1305, 1311 (10th Cir. 1999) (quotations omitted), and a penalty that "rais[es] money to help defray an agency's regulatory expenses," *id.*, or serves "punitive purposes," *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000). *See also Hoeper v. Tax Comm'n of Wis.*, 284 U.S. 206, 217 (1931) (distinguishing between a "revenue measure[ ]" and a law "imposing regulatory taxes"); *Hager v. City of W. Peoria*, 84 F.3d 865, 870-71 (7th Cir. 1996) (analyzing whether the TIA barred a challenged to a permit fee, and stating that "[r]ather than a question solely of where the money goes, the issue is *why* the money is taken"); *Robertson v. United States*, 582 F.2d 1126, 1128 (7th Cir. 1978) (distinguishing between "regulatory taxes" and "revenue-raising taxes").

* * *

DMA's action seeks to restrain the collection of sales and use taxes in Colorado. The state's notice and reporting obligations, while not taxes themselves, were enacted with the sole purpose of increasing use tax collection. Indeed, the obligations for non-collecting retailers are a substitute for requiring these same retailers to collect sales and use taxes at the point of sale, an approach the Colorado legislature deemed foreclosed by the Supreme Court's decision in *Quill*. Having determined that DMA's action falls within the TIA's prohibition on federal lawsuits that would "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law," 28 U.S.C. § 1341, we proceed to the statute's second element.

2. Does DMA have a plain, speedy, and efficient remedy in Colorado?

For the TIA to apply, DMA must also have a "plain, speedy and efficient remedy in the courts of [Colorado]." 28 U.S.C. § 1341. This part of the TIA requires that Colorado law offer a "full hearing and judicial determination" on its claims. *See Rosewell,* 450 U.S. at 514 (quotations omitted). We must be convinced that Colorado laws provides DMA with sufficient process to challenge the notice and reporting requirements. *See Hill*, 478 F.3d at 1253-54.

As previously discussed, Congress intended for the TIA to impose a "broad jurisdictional barrier" that "limit[s] drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Farm Credit Servs.*, 520 U.S. at 825; *see also Grace Brethren Church*, 457 U.S. at 413. The TIA's "plain, speedy and efficient remedy" provision is therefore interpreted "narrowly" to "be faithful to [this] congressional intent." *Id.* Our narrow inquiry asks only whether the "state-court remedy meets certain minimal *procedural* criteria." *Rosewell*, 450 U.S. at 512; *see also Colonial Pipeline Co. v. Morgan*, 474 F.3d 211, 218 (6th Cir. 2007) ("The plain, speedy and efficient remedy contemplated by [the Tax Injunction Act] merely requires that the state provide certain minimal procedural protections against illegal tax collection." (quotations omitted)). The TIA does not require that the state provide the *best* or *speediest* remedy. *See Roswell*, 450 U.S. at 520; *Alnoa G. Corp. v. City of Houston, Tex.*, 563 F.2d 769, 772 (5th Cir. 1977). And "the likelihood of [a] plaintiff's success in the state court is not a factor when determining whether the jurisdictional prohibition of [the TIA] applies." *Cities Serv. Gas Co. v. Okla. Tax Comm'n*, 656 F.2d 584, 586 (10th Cir. 1981).

DMA does not challenge the process available to it in Colorado. Colorado state courts can and do grant relief in cases challenging the constitutionality of tax measures. *See Riverton Produce Co. v. State*, 871 P.2d 1213, 1230 (Colo. 1994) (en banc). Further, Colorado courts have considered Commerce Clause challenges involving taxes. *See Gen. Motors Corp. v. City & Cnty. of Denver*, 990 P.2d 59, 73 (Colo. 1999) (en banc); *People v. Boles*, 280 P.3d 55, 62-63 (Colo. App. 2011). Circuit courts have routinely said that such available process in state court satisfies the

TIA's "plain, speedy and efficient remedy" element. *See, e.g., Washington v. Linebarger, Goggan, Blair, Pena & Sampson, LLP*, 338 F.3d 442, 444-45 (5th Cir. 2003) (availability of a state tax protest provision "or a state declaratory action" was an adequate remedy); *Folio v. City of Clarksburg, W. Va.*, 134 F.3d 1211, 1215 (4th Cir. 1998) (declaratory relief available in state court); *Smith v. Travis Cnty. Educ. Dist.*, 968 F.2d 453, 456 (5th Cir. 1992) (remedy available in state court); *Burris v. City of Little Rock*, 941 F.2d 717, 721 (8th Cir. 1991) ("[Plaintiffs] could also have obtained a declaratory judgment under Ark. Code Ann. § 16-111-103. Federal constitutional claims may, of course, be raised in state court."); *Long Island Lighting Co. v. Town of Brookhaven*, 889 F.2d 428, 431 (2d Cir. 1989) (declaratory judgment available under New York law); *Ashton v. Cory*, 780 F.2d 816, 819-20 (9th Cir. 1986) (plaintiff had no plain state refund remedy, but had already "assert[ed] its claims in the California courts," which "afford[ed] the required full hearing and judicial determination of its preemption claims"); *Sipe v. Amerada Hess Corp.*, 689 F.2d 396, 405 (3d Cir. 1982) (in personam proceeding could be maintained in state court).

We are hesitant, however, to stop our analysis there. The Supreme Court in *Hibbs* suggested that the TIA does not refer to general process available in state court. The Court said that a "plain, speedy and efficient remedy" under 28 U.S.C. § 1341 is "not one designed for the universe of plaintiffs who sue the State. Rather, it [is] a remedy tailormade for taxpayers." 542 U.S. at 107. It then cited to decisions in which taxpayers were allowed to protest taxes in state court after first seeking a refund under state administrative law. Although the *Hibbs* Court was not deciding any issue specifically dealing with the "plain, speedy and efficient remedy" language of the TIA, its brief discussion suggests that the statutory language may contemplate something more than the general availability of a remedy to "the universe of plaintiffs who sue the State."[8]

As discussed earlier, in *Hill v. Kemp,* this court determined that the TIA may bar third-party non-taxpayer lawsuits, despite the *Hibbs* Court's discussion of taxpayer lawsuits. 478 F.3d at 1249 ("Nothing in the language of the TIA indicates that our jurisdiction to hear challenges to state taxes can be turned like a spigot, off when brought by taxpayers challenging their own liabilities and on when brought by third parties challenging the liabilities of others."). In *Hill,* the plaintiffs had a

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[8] Despite this language in *Hibbs*, the Seventh Circuit, sitting en banc, recently determined that the TIA applied where a plain, speedy, and efficient remedy was available generally in state court. In *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722 (7th Cir. 2011) (Posner, J.) (en banc), casinos challenged in federal court Illinois statutes requiring them to deposit a portion of their revenues in a state fund for racetracks. *Id.* at 725. The casinos, alleging a RICO violation, asked the federal court to impose "a constructive trust in their favor on the money received by the racetracks." *Id.* After determining that the action "would thwart the tax as surely as an injunction against its collection," *id.* at 726, the court briefly addressed the TIA's "plain, speedy and efficient remedy" language. It determined that there was such a remedy because "the casinos [could] ask an Illinois state court to impose a constructive trust on the tax receipts." *Id.* at 734. In other words, the casinos could do in state court what they sought to do in federal court.

This post-*Hibbs* opinion supports applying the TIA here, where state court process is available to DMA "plain, speedy and efficient" remedy in state court because Oklahoma tax statutes provided "a general right to protest taxes before the Tax Commission," as well as a right of action to remedy grievances for any state tax law that is contrary to federal law or the Constitution. *Id.* at 1253-54 (citing 68 Okla. Stat. §§ 201 et seq. and *id.* § 226). Oklahoma law also specifically allowed for declaratory relief against unlawful taxes. *Id.* at 1254 (citing 12 Okla. Stat. § 1397).

Thus, in *Hill*, the plaintiffs could seek a remedy under specific state tax laws. This was consistent with *Hibbs* in that these remedies were not available to the universe of plaintiffs suing the state. Accordingly, we address whether Colorado's tax laws similarly provide a more specific remedy to DMA: How can DMA or the remote retailers it represents challenge Colorado's statutory scheme outside of filing an action in state court for injunctive relief or declaratory relief?

DMA complains that Colorado's laws force remote retailers to choose between obeying the notice and reporting requirements and remitting sales tax to the Department. Aplee. Br. at 46-47. Much like a taxpayer who seeks to challenge a state tax but must first pay the tax and seek a refund under state law, a remote retailer could choose to remit sales tax and then seek a refund. Colo. Rev. Stat. § 39-26-703(2.5)(a) allows retailers to "file *any claim for refund* with the executive director of the department of revenue." (Emphasis added).[9] In pursuing the refund, the retailer could argue that Colorado laws unconstitutionally coerce it to choose between collecting a sales tax and complying with the notice and reporting requirements, the same Commerce Clause argument it brings here. *See* Aplee. Br. at 46-47 ("[T]he State of Colorado seeks to *compel* retailers who have declined to collect Colorado sales tax voluntarily[ ] to give[ ]up their constitutional rights not to collect such taxes. Although the [Department] argues that the retailer's decision in the face of such coercion is a 'choice,' the Constitution precludes such oppressive and discriminatory measures against interstate commerce." (citation omitted)). The director then would "promptly examine such claim make a refund or allow a credit to any [retailer] who establishes that such [retailer] overpaid the tax due." Colo. Rev. Stat. § 39-26-703(2.5)(a). If the retailer is "aggrieved at the final decision," it may seek review in the state district courts. *Id.* § 39-26-703(4).

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[9] If a retailer chooses to pay sales tax rather than comply with the notice and reporting requirement, the retailer is "liable and responsible for the payment" of sales tax of 2.9 percent, payable

Another remedy for a remote retailer is to challenge any penalties it incurs for failing to comply with the notice and reporting obligations. *See, e.g., id.* § 39-21-112(3.5)(c)(II), (d)(III)(A)-(B) (providing for penalties. Under Colo. Rev. Stat. § 39-21-103, a taxpayer may dispute a tax owed to the Department after receiving a notice of deficiency and may request a hearing. Although this provision discusses tax

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monthly by submitting a return to the Department. Colo. Rev. Stat. § 39-26-105(1)(a). If the retailer does not collect the tax from purchasers, but still pays the 2.9 percent as required by law, the refund claim would be on the retailer's behalf. *See id.* § 39-26-703(2.5)(a) (executive director is to determine whether the *vendor* overpaid tax). If the retailer collects sales tax from purchasers and remits it to the Department, it can bring a refund claim on behalf of the purchasers if the retailer complies with certain requirements. *Id.* § 39-26-703(2.5)(b).

deficiencies, it also contemplates disputes involving *penalties* owed to the Department. *See id.* § 39-21-103(8)(c). This provision also contemplates the taxpayer and the executive director agreeing that "a question of law arising under the United States or Colorado constitutions" is implicated in the dispute, bypassing a hearing, and going "directly to the district court." *Id.* § 39-21-103(4.5).[10]

We are satisfied that Colorado provides avenues for remote retailers to challenge the scheme allegedly forcing them to choose between collecting sales tax and complying with the notice and reporting requirements. Colorado's administrative remedies provide for hearings and appeals in state court, as well as ultimate review in the United States Supreme Court. *See Rosewell*, 450 U.S. at 514 (a plain, speedy, and efficient remedy exists if a "full hearing and judicial determination" is available and the party "may raise any and all constitutional objections to the tax"); *see also Colonial Pipeline*, 474 F.3d at 218 ("State procedures that call for an appeal to a state court from an administrative decision meet these minimal criteria." (quotations omitted)). Whether DMA or a remote retailer it represents files a similar lawsuit in state court seeking injunctive and declaratory relief, or whether it follows Colorado's administrative tax procedures, a plain, speedy, and efficient remedy is available in Colorado.

III. CONCLUSION

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[10] This provision applies to "taxpayers." Colorado law defines "taxpayer" as "a person against whom a deficiency is being asserted, whether or not he has paid any of the tax in issue prior thereto." Colo. Rev. Stat. § 39-21-104(4). A "person" includes business entities such as retailers. *Id.* § 39-21-101(3).

The TIA divested the district court of jurisdiction over DMA's Commerce Clause claims, and we therefore have no jurisdiction to reach the merits of this appeal.[11] We remand for the district court to dismiss DMA's Commerce Clause claims for lack of jurisdiction, dissolve the permanent injunction entered against the Department, and take further appropriate action consistent with this opinion.

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[11] Although we remand to dismiss DMA's claims pursuant to the TIA, we note that the doctrine of comity also militates in favor of dismissal. *See Brooks*, 801 F.2d at 1240-41 ("Though we find that section 1341 deprived the federal district courts of subject-matter jurisdiction in this action, we conclude that the doctrine of comity also provides a basis for arriving at the same conclusion."). Even in cases where the TIA may not apply, "principles of federal equity may nevertheless counsel the withholding of relief." *Rosewell*, 450 U.S. at 525-26 n. 33 (1981). As the Supreme Court stated in *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323 (2010), the comity doctrine is "[m]ore embracive than the TIA" and "restrains federal courts from entertaining claims for relief that risk disrupting state tax administration." *Id.* at 2328. This reluctance to interfere with taxation out of deference for state governance can even extend to lawsuits seeking to enjoin state tax benefits to others, where the TIA may not apply. *See id.* at 2332 (clarifying *Hibbs* as relying on the TIA and concluding that comity can extend further to preclude jurisdiction).

In Levin, the Court discussed three factors that "compel[led] forbearance on the part of federal district courts" with respect to a Commerce Clause and equal protection challenge to Ohio's taxation scheme: (1) the state enjoyed great freedom in tax classifications, as opposed to more suspect classifications; (2) the plaintiffs sought to improve their competitive position; and (3) the state courts were not as constrained in fashioning a remedy. *Id.* at 2336. Similar considerations control here and "demand deference to the state adjudicative process." *Id.*

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Judge Robert E. Blackburn

Civil Case No. 10-cv-01546-REB-CBS

THE DIRECT MARKETING ASSOCIATION,

Plaintiff,

v.

ROXY HUBER, in her capacity as Executive Director, Colorado Department of Revenue,

Defendant.

March 30, 2012

ORDER CONCERNING CROSS MOTIONS FOR SUMMARY JUDGMENT

Blackburn, J.

This matter is before me on the parties' cross motions for summary judgment: (1) Plaintiff's Motion for Summary Judgment as to Counts I and II Alleging Violations of the Commerce Clause [#98][1]; and (2) Defendant's Motion for Partial Summary Judgment – Counts I and II (Commerce Clause) [#99], both filed May 6, 2011. The parties both filed responses [#100 & #101] and replies [#102 & 103].[2] I grant the plaintiff's motion, and I deny the defendant's motion.

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[1] "[#98]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). I use this convention throughout this order.

I. JURISDICTION & STANDING

I have jurisdiction over this case under 28 U.S.C. § 1331 (federal question). Although the defendant challenges the plaintiff's standing to pursue certain of its claims, the defendant does not challenge the plaintiff's standing to present its claims under the Commerce Clause. I conclude that the plaintiff has standing on these claims. The parties seek summary judgment only on the claims under the Commerce Clause. Therefore, I need not and do not address standing further.

II. STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A dispute is "genuine" if the issue could be resolved in favor of either party. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 47 5 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Farthing v. City of Shawnee*, 39 F.3d 1131, 1135 (10th Cir. 1994). A fact is "material" if it might reasonably affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *Farthing*, 39 F.3d at 1134.

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[2] The issues raised by and inherent to the cross-motions for summary judgment are fully briefed, obviating the necessity for evidentiary hearing or oral argument. Thus, the motions stand submitted on the briefs. *Cf.* Fed. R. Civ. P. 56(c) and (d) *Geear v. Boulder Cmty. Hosp.*, 844 F.2d 764, 766 (10th Cir. 1988) (holding that hearing requirement for summary judgment motions is satisfied by court's review of documents submitted by parties).

A movant who bears the burden of proof at trial must submit evidence to establish every essential element of its claim. *See In re Ribozyme Pharmaceuticals, Inc. Securities Litigation*, 209 F.Supp.2d 1106, 1111 (D. Colo. 2002). Once the motion has been supported properly, the burden shifts to the nonmovant to show, by tendering depositions, affidavits, and other competent evidence, that summary judgment is not proper. *Concrete Works, Inc. v. City & County of Denver*, 36 F.3d 1513, 1518 (10th Cir. 1994), *cert. denied*, 115 S.Ct. 1315 (1995). All the evidence must be viewed in the light most favorable to the party opposing the motion. *Simms v. Oklahoma ex rel Department of Mental Health and Substance Abuse Services*, 165 F.3d 1321, 1326 (10th Cir.), *cert. denied*, 120 S.Ct. 53 (1999).

III. BACKGROUND

The plaintiff, The Direct Marketing Association (DMA), asks the court to enter a permanent injunction enjoining the defendant from enforcing the notice and reporting obligations imposed on many out-of-state retailers under a Colorado law, now codified at § 39-21-112(3.5), C.R.S. (2010) (the Act), and under the concomitant regulations promulgated by the Colorado Department of Revenue (DOR) to implement the Act, 1 Colo. Code Regs. § 201-1:39-21-112.3.5 (2010) (the Regulations).[3] In general, the Act and Regulations require retailers that sell products to customers in Colorado, but do not collect and remit Colorado sales tax on those transactions, to report certain information about the customers' purchases from the retailer to each customer and to the Colorado Department of Revenue.

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[3] Copies of the Act and the Regulations are attached to the DMA's motion for preliminary injunction [#15] as Exhibits 1 and 2.

The DMA is an association of businesses and organizations that market products directly to consumers via catalogs, magazine and newspaper advertisements, broadcast media, and the internet. The Act and the Regulations will affect many members of the DMA. The defendant, Roxy Huber, is the Executive Director of the Colorado Department of Revenue, the state agency charged with enforcing the Act and the Regulations. The DMA alleges that certain requirements of the Act and the enabling Regulations violate the constitutional rights of many members of the DMA. The present motions concern the contention of the DMA that the Act and the Regulations violate the rights of many of its members under the Commerce Clause of the United States Constitution. *U.S. Const.* art. I, § 8.

The Act and the Regulations establish three new obligations for retailers who sell products to customers in Colorado, but who do not collect and remit Colorado sales tax on those transactions. First, such retailers must notify their Colorado customers that the retailer does not collect Colorado sales tax and, as a result, the purchaser is obligated to self-report and pay use tax to the DOR (Transactional Notice).

Second, such retailers must provide each of their Colorado customers an annual reporting detailing that customer's purchases from the retailer in the previous calendar year, informing the customer that he or she is obligated to report and pay use tax on such purchases, and informing the customer that the retailer is required by law to report the customer's name and total amount of the customer's purchases from that retailer to the DOR (Annual Purchase Summary). The Annual Purchase Summary must be provided only to customers who spend more than 500 dollars in the calendar year with the particular reporting retailer.

Third, such retailers must provide the DOR with an annual report concerning each of the retailer's Colorado customers stating the name, billing address, shipping addresses, and the total amount of purchases from the retailer by each of the retailer's Colorado customers (Customer Information Report). The Law exempts retailers with less than 100,000 dollars in gross annual sales in Colorado.

The Act and the Regulations are tools for DOR to enforce and collect the long-existing Colorado sales and use tax. Colorado enacted a sales tax in 1935 and a complementary use tax in 1937. Use tax is due on the storage, usage, or consumption of tangible property within Colorado when sales tax has not been paid. § 39-26-202, C.R.S. Of course, the use tax is designed to capture sales tax revenue that is lost when sales are diverted out of state or are accomplished remotely, as through catalog purchases or via the Internet. The obligation to pay the sales or use tax is on the consumer. *J.A. Tobin Construction Co. v. Weed,* 407 P.2d 350, 353 (Colo. 1965).

Ultimately, the DMA seeks a declaration that the Act and the Regulations are unconstitutional because they violate the Commerce Clause. On the same basis, the DMA seeks a permanent injunction enjoining enforcement of the Act and the Regulations.

IV. THE DORMANT COMMERCE CLAUSE

The Commerce Clause expressly authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." *U.S. Const.* art. I, § 8. The Commerce Clause long has been read as having a negative or dormant sweep as well. The clause, "'by its own force' prohibits certain state actions that interfere with interstate commerce." *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 309 (1992) (quoting *South Carolina State Highway Dept. v. Barnwell Brothers, Inc.*, 303 U.S. 177, 185 (1938)). The negative Commerce Clause "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Or.*, 511 U.S. 93, 98 (1994).

The DMA asserts two claims under the dormant Commerce Clause. First, the DMA contends that the Act and the Regulations discriminate impermissibly against interstate commerce. I will refer to this claim as the discrimination claim. Second, the DMA contends that the Act and the Regulations impermissibly impose undue burdens on interstate commerce. I will refer to this claim as the undue burden claim.

V. DISCRIMINATION CLAIM

A state law violates the discrimination aspect of the dormant Commerce Clause if it discriminates against interstate commerce either facially or in practical effect. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). The United States Supreme Court has adopted a two tier approach to analyzing discrimination claims. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578-579 (1986). At the first tier, "(w)hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Id.* at 579. When "a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Id. (citing Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). The second tier of the analysis is the balancing of a state's legitimate interests with the burden on interstate commerce under the *Pike* analysis.

> We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.

Id.; see also Kleinsmith v. Shurtleff, 571 F.3d 1033, 1039-1044 (10th Cir. 2009) (describing and applying the two tier analysis).

Under the dormant Commerce Clause, a law discriminates against interstate commerce if it imposes "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Or.*, 511 U.S. 93, 99 (1994). In *Oregon Waste Systems,* for example, the Supreme Court concluded that Oregon's two dollar and twenty-five cent per ton surcharge on out-of-state solid waste brought into Oregon for disposal when compared to the eighty-five cents per ton surcharge imposed on in-state solid waste was discriminatory in violation of the dormant Commerce Clause. *Id.* at 100. The *Oregon Waste Systems* Court noted that the degree of a differential burden or charge on interstate commerce "is of no relevance to the determination whether a State has discriminated against interstate commerce." *Id.* at 100 n.4 (internal quotation and citation omitted). "If a restriction on commerce is discriminatory, it is virtually *per se* invalid." *Id.* at 99 (citations omitted). In *Oregon Waste Systems*, the court found the statute in question to be facially discriminatory and "virtually *per se*" invalid. *Id.* at 100. Facing that conclusion, the Court determined that the statute must be invalidated unless the state can show that the statute "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. *Id.* at 101 (citation and internal quotation omitted). Justifications for discriminatory restrictions on commerce must pass the strictest scrutiny. *Id.* Strict scrutiny leaves few survivors. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. §§. 425, 455 (2002).

On their face the Act and the Regulations do not distinguish between in-state retailers (those with a physical presence – a brick and mortar presence – in the state) and out-of-state retailers (those with no physical presence in the state who make sales to customers in the state). Rather, the Act focuses on the distinction between retailers who collect Colorado sales tax and those who do not collect Colorado sales tax. See, e.g., § 39-21-112, C.R.S. As the defendant notes, this distinction between collecting and non-collecting retailers is driven by the Commerce Clause established in *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 309 (1992) and related cases. *Defendant's motion* [#99], p. 14.

Quill concerned an undue burden claim under the dormant Commerce Clause, but its holding drives the analysis of the Act and the Regulations in relation to the plaintiff's discrimination claim. Under the law established in *Quill* and related cases, Colorado may not impose any duty to collect sales and use taxes on out-of-state retailers whose only connection to Colorado is by common carrier or the U.S. mail. *Quill*, 504 U.S. at 315. Rather, a duty to collect such taxes may be imposed only on retailers who have a physical presence in the state. *Id.* at 317-318. Thus, out-of-state retailers that do not have a physical presence in Colorado are not obligated to collect and remit sales tax on their sales to customers in Colorado. According to the plaintiff, the Act and the Regulations discriminate impermissibly against this group of out-of-state retailers by imposing on those retailers burdens that are not be borne by in-state retailers.

A. FIRST TIER ANALYSIS

According to the defendant, the Act and Regulations do not discriminate against out-of-state retailers and interstate commerce because, reading the plain language of the Act and the Regulations, they both apply to all retailers, in-state and out-of-state, that sell to Colorado purchasers but do not collect Colorado sales tax. Applying the law established by the Supreme Court, I conclude that the veil provided by the words of the Act and the Regulations is too thin to support the conclusion that the Act and the Regulations regulate in-state and out-of-state retailers even-handedly. This is true because, viewed in the context of *Quill* and provisions of Colorado law that require all in-state retailers to collect sales tax, I am constrained to conclude that the Act and the Regulations directly regulate and discriminate against out-of-state retailers and, therefore, interstate commerce.

Under Colorado law, all retailers doing business in Colorado and selling to Colorado purchasers must obtain a sales tax license and must collect and remit the sales tax applicable to each sale. §§ 39-26-103, 104, 106, 204, C.R.S. Civil and criminal penalties may be imposed on a retailer who fails to comply. §§ 39-21-118(2), 39-26-103(1)(a), (4), C.R.S. Under *Quill* and related law, these duties and penalties cannot be imposed on out-of-state retailers whose only connection to Colorado is by common carrier or the U.S. mail. 504 U.S. at 315. Thus, under Colorado law, the obligation to collect and remit sales tax is imposed only on in-state retailers, retailers with a physical presence in the state. Under the Act and the Regulations, retailers who collect and remit Colorado sales tax are not obligated to provide the

Transactional Notice, the Annual Purchase Summary, and the Customer Information Report otherwise required by the Act and the Regulations. § 39-21-112, C.R.S. Assuming they comply with the mandates of Colorado law, in-state retailers are not subject to the Act and the Regulations.[4]

Explicitly, the Act defines those who are subject to its reporting requirements as "any retailer that does not collect Colorado sales tax." § 39-21-112, C.R.S. Given the circumstances described above, only out-of-state retailers must provide the Transaction Notice and the Annual Purchase Summary to their customers. Only out-of-state retailers must provide the Customer Information Report to the state.[5] The Act and the Regulations impose a notice and reporting burden on out-of-state retailers and that burden is not imposed on in-state retailers. It is undisputed that compliance with the Act and the Regulations would impose some burdens, including costs of compliance and possibly lost sales, on out-of-state retailers.

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[4] Evidence submitted by the defendant indicates that the Tax Compliance Section of the Colorado Department of Revenue discovers each year only a very small number of Colorado retailers who are not complying with their legal obligation to collect and remit sales tax. *Response to motion for preliminary injunction* [#50], Exhibit 16 (Reiser Affidavit). The existence of this inconsequential number of non-compliant in-state retailers does not change the Commerce Clause analysis.

[5] As noted in the background section above, these requirements do not apply to retailers whose sales to a particular customer are below a certain level, or whose gross sales in Colorado during a calendar year are below a certain level. Even with these limitations, the Act and the Regulations will be applicable to many out-of-state retailers. These limitations of the Act and the Regulations are not relevant to the first tier discrimination analysis.

The defendant argues that demonstrating differential treatment alone is not sufficient to prove that the Act and the Regulations are discriminatory. *Defendant's response* [#101], pp. 14-15. That is true, but only when analyzing a statute that regulates evenhandedly and has only indirect effects on interstate commerce. For example, in *Kleinsmith* the court determined that the statute in question did not discriminate on its face and, therefore, proceeded to determine if the evidence established that the statute discriminated in its practical effect. *Kleinsmith*, 571 F.3d 1033, 1040-1041. In that context, the court concluded that "(n)ot every benefit or burden will suffice [to show discriminatory effect] – only one that alters the competitive balance between in-state and out-of-state firms." *Id.* at 1041. However, when considering a regulatory scheme that does not regulate evenhandedly between in-state and out-of-state retailers, like the Act and the Regulations, the degree of a differential burden or charge on interstate commerce "is of no relevance to the determination whether a State has discriminated against interstate commerce." *Oregon Waste Systems*, 511 U.S. at 100 n. 4 (internal quotation and citation omitted).

The defendant argues also that the Act and the Regulations do not discriminate because retailers subject to the Act and the Regulations, by definition out-of-state retailers, may choose between two alternatives: comply with the Act and the Regulations or voluntarily collect and remit Colorado sales tax. *Defendant's motion* [#99], pp. 15-16. Of course, the choice to collect and remit imposes the same burden faced by in-state retailers. According to the defendant, "there can be no discrimination against non-collecting out-of-state retailers who have a choice to be subject to precisely the same burdens as in-state retailers who do not enjoy the same choice." *Defendant's response* [#101], p. 17.

The state's creation of this option does not resolve the problem. Under *Quill* Colorado may not condition an out-of-state retailer's reliance on its rights on a requirement that the retailer accept a different burden, particularly when that burden is unique to out-of-state retailers. *See Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 893 (1988). Stated differently, without the Act and the Regulations, out-of-state retailers did not have the burden of making this choice. The Act and the Regulations impose the burden of this choice on out-of-state retailers but do not on in-state retailers. The choice does not eliminate, but instead, highlights the discrimination.

Regardless of the state's salutary local purposes, its enactment of a statutory scheme and concomitant regulations that produce, in effect, a geographic distinction between in-state and out-of-state retailers discriminates patently against interstate commerce. Given that patent discrimination, the Act and the Regulations violate the Commerce Clause, unless the defendant can satisfy the requirements of the second tier of the discrimination analysis.

B. SECOND TIER ANALYSIS

Under *Oregon Waste*, the second tier of the analysis requires a determination of whether the Act and the Regulations advance a legitimate local purpose that cannot be served adequately by reasonable nondiscriminatory alternatives. *Oregon Waste*, 511 U.S. at 101. When discrimination against commerce is demonstrated, "the burden falls on the State to justify it both in terms of local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). The *Oregon Waste* Court undertook this analysis, despite its discussion of *per se* invalidity when a law is facially discriminatory. *Id.* Justifications for discriminatory restrictions on commerce must pass the strictest scrutiny. *Id.*

The defendant argues that the State of Colorado has three important interests at stake. First, the Act and the Regulations enhance the DOR's ability to recover sales and use tax revenue due to the state.[6] Second, enforcement of sales and use taxes promotes the fair distribution of the cost of government. Third, promoting the enforcement of tax law promotes respect for and compliance with the tax laws. Without question, these are legitimate state interests and purposes.

According to the plaintiff, there are at least three reasonable nondiscriminatory alternatives to serve these purposes. First, some states include a line on their resident income tax returns on which residents report use tax due. Second, the DOR could increase audits of business consumers. Third, consumer education and notification programs may increase compliance with use tax obligations. *Plaintiff's motion* [#98], p. 9.

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[6] The defendant argues that the Law and the Regulations also enhances DOR's ability to recover sales taxes. The notice and reporting obligations at issue all relay information about the use tax liability of a Colorado resident who buys something from an affected out-of-state retailer. Collection of sales tax is enhanced only to the extent that regulatory scheme encourages out-of-state retailers to collect and remit sales tax rather than comply with the Law and the Regulations.

Relying on its contention that the Act and the Regulations are not discriminatory, the defendant spends little time addressing reasonable nondiscriminatory alternatives. *Defendant's response* [#101], p. 12 n. 4. According to the defendant, Colorado has not previously included a line on its income tax returns for reporting use tax. *Defendant's response* [#101], pp. 4-5. However, between 1966 and 1974, the DOR included a consumer use tax return with income tax return forms. *Id.* That practice was discontinued because the amount of tax collected did not justify the printing expense. *Id.*

The record contains essentially no evidence to show that the legitimate interests advanced by the defendant cannot be served adequately by reasonable nondiscriminatory alternatives. Therefore, the defendant has not met its very high burden of proof under the strict scrutiny standard applicable in the second tier of the Commerce Clause discrimination analysis.

C. CONCLUSION

Quill puts states like Colorado in a difficult position. The state cannot require out-of-state retailers, retailers with no physical presence in the state, to collect and remit sales tax on sales those retailers make to residents of Colorado. Residents who make purchases from those retailers are obligated to pay use tax on those purchases, but enforcing the use tax is significantly more difficult than enforcing the sales tax. Seeking to enhance enforcement of the use tax on those who make purchases from out-of-state retailers, a state understandably looks to the out-of-state retailers for key information that can enhance enforcement. However, if the state has a mandatory sales tax system, as does Colorado, enforcing a reporting requirement on out-of-state retailers will, by definition, discriminate against the out-of-state retailers by imposing unique burdens on those retailers. Such a system imposes a differential burden on out-of-state retailers because the different burden is imposed precisely because the retailer is an out-of-state retailer entitled to the protection of *Quill*. *Quill* creates the in-state versus out-of-state distinction, and the dormant Commerce Clause prohibits differential treatment based on that distinction. Only a change in the law by the Supreme Court or action by Congress can change this situation. *Quill*, 504 U.S. at 318 ("Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes.")

Viewing the undisputed facts in the record in the light most favorable to the defendant, I conclude that the Act, codified at § 39-21-112(3.5), C.R.S. (2010), and the concomitant Regulations promulgated by the Colorado Department of Revenue (DOR) to implement the Act, 1 Colo. Code Regs. § 201-1:39-21-112.3.5 (2010), are unconstitutional under the dormant Commerce Clause. That is true because the Act and the Regulations directly regulate and discriminate against out-of-state retailers and, therefore, interstate commerce. That discrimination triggers the virtually per se rule of facial invalidity.

The defendant has not surmounted that facial invalidity by showing that the Act and the Regulations serve legitimate state purposes that cannot be served adequately by reasonable nondiscriminatory alternatives. Thus, the plaintiff is entitled to summary judgment on its first claim for relief for discrimination under the Commerce clause. Obversely, the defendant's motion for summary judgment on this claim must be denied.

VI. UNDUE BURDEN CLAIM

In its second claim for relief, the DMA alleges that the Act and the Regulations impose improper and burdensome regulations on interstate commerce. The DMA relies heavily on the law established in *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 309 (1992) to support its undue burden claim. To rehearse, in *Quill*, the Court concluded that undue burdens on interstate commerce sometimes may be avoided by the application of a bright line rule. According to *Quill*, the dormant Commerce Clause and the Court's earlier holding in *National Bellas Hess, Inc. v. Department of Revenue of State of Ill.*, 386 U.S. 753, 758 (1967) create a bright line rule with regard to the collection of sales and use tax. This law creates a "safe harbor for vendors whose only connection with customers in the [taxing] State is by common carrier or the United States mail. Under *Bellas Hess*, such vendors are free from state-imposed duties to collect sales and use taxes." *Quill*, 504 U.S. at 315 (internal quotation omitted). Many members of the DMA are vendors that have no physical presence in Colorado and whose only connection with Colorado customers is by common carrier, the United States mail, and/or the internet.

The *Quill* Court examined and applied the quadripartite test enunciated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Under *Complete Auto*, a state tax will survive a Commerce Clause challenge as long as the tax (1) is applied to an activity with a substantial nexus in the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state. *Complete Auto*, 430 U.S. at 279. *Complete Auto* rejected the previously applied distinction between direct and indirect taxes on interstate commerce "because that formalism allowed the validity of statutes to hinge on legal terminology, draftsmanship and phraseology." *Quill*, 430 U.S. at 310 (internal quotation, citation, and brackets omitted). The *Complete Auto* test emphasizes the importance of looking past the formal language of a tax statute to its practical effect. *Quill*, 504 U.S. at 310. The first and fourth prongs of the *Complete Auto* test "limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce." *Quill*, 504 U.S. at 313. The safe harbor established in *Quill* is a meant to delineate and define the limits of the substantial nexus requirement of the *Complete Auto* test to ensure that a state tax law does not impose an undue burden on interstate commerce. *Id.*

As the defendant notes, the Act and the Regulations do not require out-of-state retailers to collect sales and use taxes. However, they do require out-of-state retailers to gather, maintain, and report information, and to provide notices to their Colorado customers and to the DOR. Those notices are required to provide information about the out-of-state retailers and their Colorado customers. The sole purpose of these requirements is to enhance the collection of use taxes by the State of Colorado. The defendant asserts no other reason to require such reporting.

Correctly, the defendant notes that the holding in *Quill* has a very "narrow focus on sales and use taxes." *Capital One Bank v. Commissioner of Revenue*, 899 N.E.2d 76, 84 (Mass. 2009). When addressing taxes and regulations outside of that narrow focus, many cases hold that *Quill's* narrow focus should not be expanded into other areas. *See, e.g., Capital One* 899 N.E.2d at 86 (*Quill* dormant Commerce Clause standard is not applicable to financial institution excise taxes); *American Target Advertising, Inc. v. Giani*, 199 F.3d 1241, 1255 (10th Cir. 2000) (narrow analysis of *Quill* not applicable to law requiring all professional fund raising consultants to register).

In this case, the burden of the notice and reporting obligations imposed by the Act and the Regulations is somewhat different than the burden of collecting and remitting sales and use taxes. However, the sole purpose of the burdens imposed by the Act and the Regulations is the ultimate collection of use taxes when sales taxes cannot be collected. Looking to the practical effect of the Act and the Regulations, as *Quill* instructs, I conclude that the burdens imposed by the Act and the Regulations are inextricably related in kind and purpose to the burdens condemned in *Quill*. The Act and the Regulations impose these burdens on out-of-state retailers who have no physical presence in Colorado and no connection with Colorado customers other than by common carrier, the United States mail, and the internet. Those retailers are protected from such burdens on interstate commerce by the safe-harbor established in *Quill*.

Viewing the undisputed facts in the record in the light most favorable to the defendant, I conclude that the Act, codified at § 39-21-112(3.5), C.R.S. (2010), and the concomitant Regulations promulgated by the Colorado Department of Revenue (DOR) to implement the Act, 1 Colo. Code Regs. § 201-1:39-21-112.3.5 (2010), are unconstitutional under the dormant Commerce Clause. That is true because, under the standard established in *Quill*, a state law that imposes a use tax collection burden on a retailer with no physical presence in the state causes an undue burden on interstate commerce. The burdens imposed by the Act and the Regulations are inextricably related in kind and purpose to the burdens condemned in *Quill*. Thus, the Act and the Regulations impose an undue burden on interstate commerce. The plaintiff is entitled to summary judgment on their second claim for relief, asserting an undue burden claim under the Commerce Clause. Thus, the defendant's motion for summary judgment on this claim must be denied.

VII. DECLARATORY & INJUNCTIVE RELIEF

A. DECLARATORY RELIEF

Under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, the court may enter a judgment declaring "the rights and other legal relations of any interested party seeking such declaration " 28 U.S.C. § 2201. Such a judgment or decree is reviewable as a final judgment. *Id.* The DMA seeks a declaration that the Act and the Regulations are unconstitutional. The DMA has established that the Act and the Regulations are unconstitutional and, therefore, the DMA is entitled to a declaratory judgment to that effect.

B. INJUNCTIVE RELIEF

A party may obtain a permanent injunction if it proves: (1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest. *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1180 (10th Cir. 2003); *see also Prairie Band Potawatomi National v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007). The DMA has established each of these elements.

1. Success on the Merits. In this order, the court grants summary judgment to DMA on its two claims asserting that the Act and the Regulations violate the Commerce Clause. With that, the DMA has achieved success on the merits of these two claims.

2. Irreparable Harm. When the impairment of a constitutional right is at issue, no further showing of irreparable harm is necessary. *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001). In a recent case, the United States Court of Appeals for the Tenth Circuit indicated that violation of Commerce Clause rights constitutes irreparable injury. *American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 2010) (citing *American Libraries Ass'n v. Pataki*, 969 F.Supp. 160, 168-183 (S.D.N.Y. 1997)). Although the Tenth Circuit's statement in *Johnson* is dicta, I conclude that violation of the constitutional rights of the members of DMA under the Commerce

Clause constitutes irreparable injury. Thus, the DMA has established irreparable harm.

3. Balance of Harms & Public Interest. When considering an injunction against a law that has been found to be unconstitutional, the balance of harms and public interest considerations largely collapse into each other. The Colorado Department of Revenue does not have a legitimate interest in enforcing a law that is unconstitutional. *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010). Moreover, "the public interest will perforce be served by enjoining the enforcement of the invalid provisions of state law." *Id.* Both of these factors have been established.

4. Conclusion. The DMA has established the four elements necessary to support the entry of a permanent injunction. The court will enter an order permanently enjoining enforcement of the Act and the Regulations against retailers who have no physical presence in the state of Colorado.

VII. CONCLUSION & ORDERS

The Act and the Regulations violate the Commerce Clause and, therefore, are unconstitutional. This is true for two reasons. First, the Act and the Regulations directly regulate and discriminate against out-of-state retailers and interstate commerce. That discrimination triggers the virtually per se rule of facial invalidity. The defendant has not overcome this facial invalidity by showing that the Act and the Regulations serve legitimate state purposes that cannot be served adequately by reasonable nondiscriminatory alternatives. Second, the Act and the Regulations impose an undue burden on interstate commerce under the standard established in *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 309 (1992).

THEREFORE, IT IS ORDERED as follows:

1. That the Plaintiff's Motion for Summary judgment as to Counts I and II Alleging Violations of the Commerce Clause [#98] filed May 6, 2011, is **GRANTED**;

2. That the Defendant's Motion for Partial Summary Judgment – Counts I and II (Commerce Clause) [#99] filed May 6, 2011, is **DENIED**;

3. That under 28 U.S.C. § 2201, the plaintiff, The Direct Marketing Association, is entitled to a judgment declaring that the provisions of § 39-21-112(3.5), C.R.S. (2010) (the Act), and the regulations promulgated thereunder, 1 Colo. Code Regs. § 201-1-1:39-21-112.3.5 (2010) (the Regulations), are unconstitutional to the extent that the Act and the Regulations require

> A. that a retailer must notify their Colorado customers that the retailer does not collect Colorado sales tax and, as a result, the purchaser is obligated to self-report and pay use tax to the Colorado Department of Revenue (Transactional Notice); and
>
> B. that a retailer must provide to each of its Colorado customers an annual report detailing that customer's purchases from the retailer in the previous calendar year, informing the customer that he or she is obligated to report and pay use tax on such purchases, and informing the customer that the retailer is required by law to report the customer's name and the total amount

of the customer's purchases from the retailer to the Colorado Department of Revenue (Annual Purchase Summary); and

C. that a retailer must provide the Colorado Department of Revenue with an annual report concerning each of the retailer's Colorado customers stating the name, billing address, shipping addresses, and the total amount of purchases from the retailer by each of the retailer's Colorado customers (Customer Information Report);

4. That effective forthwith defendant Roxy Huber, in her capacity as Executive Director, Colorado Department of Revenue, together with her agents, servants, employees, attorneys-in-fact, or anyone act on their behalf, are **PERMANENTLY ENJOINED AND RESTRAINED** from enforcing the provisions of § 39-21-112(3.5), C.R.S. (2010) (the Act) and the regulations promulgated thereunder, 1 Colo. Code Regs. § 201-1:39-21-112.3.5 (2010) (the Regulations), to the extent that the Act and the Regulations require

A. that a retailer must notify their Colorado customers that the retailer does not collect Colorado sales tax and, as a result, the purchaser is obligated to self-report and pay use tax to the Colorado Department of Revenue (Transactional Notice); and

B. that a retailer must provide to each of its Colorado customers an annual reporting detailing that customer's purchases from the retailer in the previous calendar year, informing the customer that he or she is obligated to report and pay use tax on such purchases, and informing the customer that the retailer is required by law to report the customer's name and the total amount of the customer's purchases from that retailer to the Colorado Department of Revenue (Annual Purchase Summary); and

C. that a retailer must provide the Colorado Department of Revenue with an annual report concerning each of the retailer's Colorado customers stating the name, billing address, shipping addresses, and the total amount of purchases from the retailer by each of the retailer's Colorado customers (Customer Information Report);

5. That this injunction **SHALL LIMIT** the enforcement of the Act and the Regulations against retailers who sell to customers in Colorado, but who have no physical presence in the State of Colorado and whose only connection to the State of Colorado is by common carrier or the United States Mail; and

6. That the court will address in a separate order the parties' request that the court certify this order as a final judgment under FED. R. Civ. P. 54(b)

Dated March 30, 2012, at Denver, Colorado.

BY THE COURT:

Robert E. Blackburn
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Case No. 10-cv-01546-REB-CBS

THE DIRECT MARKETING ASSOCIATION,

Plaintiff,

v.

ROXY HUBER, in her capacity as Executive Director, Colorado Department of Revenue,

Defendant.

January 26, 2011

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

Blackburn, J.

This matter is before me on the Plaintiff's Motion for a Preliminary Injunction and Incorporated Memorandum of Law [#15][1] filed August 13, 2010. The defendant filed a response [#50], and the plaintiff filed a reply [#56]. Having considered the evidence, the parties' written arguments, the relevant law, and the oral arguments presented by counsel for the parties at a hearing held on January 13, 2011, I find and conclude that the motion for preliminary injunction should be granted.

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[1] "[#15]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). I use this convention through this order.

I. JURISDICTION & STANDING

I have jurisdiction over this case under 28 U.S.C. § 1331 (federal question). Although the defendant challenges the plaintiff's standing to pursue certain of its claims in this case, the defendant does not challenge the plaintiff's standing to present its claims under the Commerce Clause. The plaintiff seeks a preliminary injunction based on its Commerce Clause claims. Therefore, I need not and do not address standing.

II. BACKGROUND

The plaintiff, The Direct Marketing Association (DMA), asks the court to enjoin the defendant from enforcing the notice and reporting obligations imposed on many out-of-state retailers under a new Colorado law, now codified at § 39-21-112(3.5), C.R.S. (2010) (the Act), and under the concomitant regulations promulgated by the Colorado Department of Revenue (DOR) to implement the Act, 1 Colo. Code Regs. § 201-1:39-21-112.3.5 (2010) (the Regulations). A copy of the Regulations is attached to the DMA's motion [#15 as Exhibit 2. In general, the Act and Regulations require retailers that sell products to customers in Colorado, but do not collect and remit Colorado sales tax on those transactions, to report certain information about the customers' purchases from the retailer to each customer and to the Colorado Department of Revenue. DMA is an association of businesses and organizations that market products directly to consumers via catalogs, magazine and newspaper advertisements, broadcast media, and the internet. The Act and the Regulations will affect many members of the DMA. The defendant, Roxy Huber, is the Executive Director of the Colorado Department of Revenue, the state agency charged with enforcing the Act and the Regulations. The DMA alleges that certain requirements of the Act and the Regulations violate the constitutional rights of many members of the DMA. In its motion for preliminary injunction, the DMA relies on its allegation that the Act and the Regulations violate the rights of many of its members under the Commerce Clause of the United States Constitution. *U.S. Const.* art. I, § 8. The DMA asserts other claims in its complaint, but the DMA does not rely on those claims as bases for its motion for preliminary injunction.

The Act and the Regulations establish three new obligations for retailers who sell products to customers in Colorado, but do not collect and remit Colorado sales tax on those transactions. First, such retailers must notify their Colorado customers that the retailer does not collect Colorado sales tax and, as a result, the purchaser is obligated to self-report and pay use tax to the DOR (Transactional Notice). Second, such retailers must provide to each of their Colorado customers an annual report detailing that customer's purchases from the retailer in the previous calendar year, informing the customer that he or she is obligated to report and pay use tax on such purchases, and informing the customer that the retailer is required by law to report the customer's name and the total amount of the customer's purchases from that retailer to the DOR (Annual Purchase Summary). The Annual Purchase Summary must be provided only the customers who spend more than 500 dollars in the calendar year with a particular retailer. Third, such retailers must provide the DOR with an annual report concerning each of the retailer's Colorado customers stating the name, billing address, shipping addresses, and the total amount of purchases from the retailer by each of the retailer's Colorado customers (Customer Information Report). The Law exempts retailers with less than 100,000 dollars in gross annual sales in Colorado. In its motion for preliminary injunction, the DMA asks the court preliminarily to enjoin Huber from enforcing those provisions of the Act and the Regulations that require retailers to provide Transactional Notices, Purchase Summaries, and Customer Information Reports.

III. STANDARD OF REVIEW

Fed. R. Civ. P 65 authorizes federal courts to issue preliminary injunctions. Because a preliminary injunction is an extraordinary remedy, the plaintiff's right to such relief must be clear and unequivocal. *See Federal Lands Legal Consortium ex rel. Robart Estate v. United States,* 195 F.3d 1190, 1194 (10th Cir. 1999). The plaintiff is entitled to a preliminary injunction only if it proves (1) that there is a substantial likelihood that it will prevail on the merits; (2) that it will suffer irreparable harm unless the preliminary injunction is issued; (3) that the threatened injury to the plaintiff outweighs the harm the preliminary injunction might cause defendant; and (4) that the preliminary injunction is in the public interest. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001).

IV. ANALYSIS

A. LIKELIHOOD OF SUCCESS

To secure a preliminary injunction, the plaintiff first must establish a substantial likelihood that it is likely to prevail on the merits of the substantive claims that are the basis for its motion. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001). "The determination of a motion for a preliminary injunction and a decision on the merits are different." *Valdez v. Applegate*, 616 F.2d 570, 572 (10th Cir. 1980). "It is not necessary that plaintiffs show positively that they will prevail on the merits before a preliminary injunction may be granted." *Atchison, Topeka and Santa Fe Railway Co. v. Lennen*, 640 F.2d 255, 261 (10th Cir. 1981). Rather, plaintiff need only establish "a reasonable probability of success, not an 'overwhelming' likelihood of success[.]" *Id.*

The plaintiff asserts two claims under the Commerce Clause of the United States Constitution and argues that it has demonstrated a substantial likelihood of success on both of these claims. The Commerce Clause expressly authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." *U.S. Const.* art. I, § 8. The Commerce Clause long has been read as having a negative or dormant sweep as well. The clause, " 'by its own force' prohibits certain state actions that interfere with interstate commerce." *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 309 (1992) (quoting *South Carolina State Highway Dept. v. Barnwell Brothers, Inc.*, 303 U.S. 177, 185 (1938)). The negative Commerce Clause "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Or.*, 511 U.S. 93, 98 (1994). A state law violates the discrimination aspect of the dormant Commerce Clause if it discriminates against interstate commerce either facially or in practical effect. *Hughes v. Oklahoma,* 441 U.S. 322, 336 (1979). If a law discriminates against interstate commerce, then the state has the burden to demonstrate a legitimate local purpose served by the law which cannot be achieved through reasonable nondiscriminatory alternatives. *Id.* at 336 – 337. If the law in question regulates evenhandedly among in-state and out-of-state interests, "and its effects on interstate commerce are only incidental, [the law] will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

i. Discrimination Claim

In its first claim for relief, the DMA alleges that the Act and the Regulations discriminate against out-of-state retailers who do not collect Colorado sales tax, because the Act and the Regulations impose on those retailers notice and reporting obligations that are not imposed on Colorado retailers. Under Colorado law, all retailers doing business in Colorado and selling to Colorado purchasers must obtain a sales tax license and must collect and remit the sales tax applicable to each sale. §§ 39-26-103, 104 C.R.S. Under the Act and the Regulations, retailers who collect and remit Colorado sales tax are not obligated to provide the Transactional Notice, the Annual Purchase

Summary, and the Customer Information Report otherwise required by the Act and the Regulations. Under the law established in *Quill* and related cases, Colorado may not impose any duty to collect sales and use taxes on out-of-state retailers whose only connection to Colorado is by common carrier or the U.S. mail. *Quill*, 504 U.S. at 315. Thus, out-of-state retailers that do not have a physical presence in Colorado generally are not obligated to collect and remit sales tax on their sales in Colorado. The plaintiff contends that the Act and the Regulations discriminate against this group of out-of-state retailers by imposing on those retailers burdens that need not be borne by in-state retailers.

In the context of the dormant Commerce Clause, a law discriminates against interstate commerce if it imposes "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Or.*, 511 U.S. 93, 99 (1994). In *Oregon Waste Systems*, for example, the Supreme Court concluded that Oregon's two dollar and twenty-five cent per ton surcharge on out-of-state solid waste brought into Oregon for disposal was discriminatory in violation of the dormant Commerce Clause, when compared to the eighty-five cents per ton surcharge imposed on in-state solid waste. *Id.* at 100. The *Oregon Waste Systems* Court noted that the degree of a differential burden or charge on interstate commerce "is of no relevance to the determination whether a State has discriminated against interstate commerce." *Id.* at n. 4 (internal quotation and citation omitted).

The text of the Act and the Regulations does not explicitly target out-of-state retailers as opposed to in-state retailers. The defendant argues that the plain language of the Act and the Regulations applies to all retailers, in-state and out-of-state, that Sell to Colorado purchasers but do not collect Colorado sales tax. Accordingly, the defendant contends that the Act and the Regulations are not discriminatory. I note, however, that under Colorado law, in-state retailers long have been required to collect and remit Colorado sales tax and are subject to civil and criminal penalties if they fail to do so. §§ 39-26-103(4); 39-21-118(2), C.R.S. Unless they defy these legal requirements, these retailers are not subject to the notice and reporting requirements of the Act and the Regulations. Evidence submitted by the defendant indicates that the Tax Compliance Section of the Colorado Department of Revenue discovers each year only a very small number of Colorado retailers who are not complying with their legal obligation to collect and remit sales tax. *Response* [#50], Exhibit 16 (Reiser Affidavit).

Under Colorado law, any retailer who is not subject to the statutory obligation to collect and remit Colorado sales tax necessarily is an out-of-state retailer. The Act and the Regulations impose a notice and reporting burden on these out-of-state retailers and that burden is not imposed on in-state retailers, except for the very few in-state retailers who defy their statutory sales tax obligations. Given these circumstances, I conclude that the plaintiff has shown a substantial likelihood that it will succeed in showing that the Act and the Regulations are discriminatory because, in practical effect, they impose a burden on interstate commerce that is not imposed on in-state commerce.

If the DMA succeeds in showing that the Act and the Regulations are discriminatory, then "the burden falls on the State to justify [them] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). However, it is exceedingly difficult to meet this standard. "If a restriction on commerce is discriminatory, it is virtually per se invalid." *Oregon Waste Systems*, 511 U.S. at 99. In this case, the defendant asserts Colorado's need to collect tax revenue as the local benefit that justifies the Act and the Regulations. Without question, this is a legitimate local interest. However, the DMA has noted the availability of non-discriminatory alternatives. For example, like other states, Colorado might collect use tax from Colorado taxpayers via the Colorado income tax form. Given this and other alternatives, I conclude that it is unlikely that the defendant will be able to show a lack of nondiscriminatory alternatives to the Act and the Regulations.

Regardless of the state's salutary local purposes, its enactment of a statutory scheme and concomitant regulations that produce, in effect, a geographic distinction between in-state and out-of-state discriminates patently against interstate commerce, *id.* at 100, which triggers the virtually per se rule of facial invalidity that has not been surmounted by a demonstration by the state of a legitimate local purpose that can not be served adequately by reasonable nondiscriminatory alternatives. *Id.* (internal quotation and citations omitted). Thus, on the current record, I conclude that the DMA has demonstrated a substantial likelihood of success on its discrimination claim under the dormant Commerce Clause.

ii. Undue Burden Claim

In its second claim for relief, the DMA alleges that the Act and the Regulations impose improper and burdensome regulation of interstate commerce. The DMA relies heavily on the law established in *Quill Corp. v. North Dakota By and Through Heitkamp,* 504 U.S. 298, 309 (1992) to support its undue burden claim. In *Quill*, the Court concluded that undue burdens on interstate commerce sometimes may be avoided by the application of a bright line rule. The *Quill* court concluded that the dormant Commerce Clause and the Court's earlier holding in *National Bellas Hess, Inc. v. Department of Revenue of State of Ill.*, 386 U.S. 753, 758 (1967) create a bright line rule with regard to the collection of sales and use tax. This law creates a "safe harbor for vendors whose only connection with customers in the [taxing] State is by common carrier or the United States mail. Under *Bellas Hess*, such vendors are free from state-imposed duties to collect sales and use taxes." *Quill*, 504 U.S. at 315 (internal quotation omitted).

The *Quill* Court examined and applied the quadripartite test enunciated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Under *Complete Auto*, a state tax will be sustained against a Commerce Clause challenge as long as the tax (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state. *Complete Auto*, 430 U.S. at 279. *Complete Auto* rejected the previously applied distinction between direct and indirect taxes on interstate commerce "because that formalism allowed the validity of statutes to hinge on legal terminology, draftsmanship and phraseology." *Quill,* 430 U.S. at 310 (internal quotation, citation, and brackets omitted). The *Complete Auto* test emphasizes the importance of looking past the formal language of a tax statute to its practical effect. *Quill*, 504 U.S. at 310. The first and fourth prongs of the *Complete Auto* test "limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce." *Quill*, 504 U.S. at 313. The safe harbor established in *Quill* is a meant to delineate and define the limits of the substantial nexus requirement of the *Complete Auto* test to ensure that a state tax law does not impose an undue burden on interstate commerce. *Id.*

The Act and the Regulations do not require out-of-state retailers to collect sales and use taxes. However, they do require out-of-state retailers to gather, maintain, and report information, and to provide notices to their Colorado customers and to the defendant about their Colorado customers. The sole purpose of these requirements is to enhance the collection of use taxes by the State of Colorado. I conclude that these requirements likely impose on out-of-state retailers use tax-related responsibilities that trigger the safe-harbor provisions of *Quill.* Although the burden of the notice and reporting obligations imposed by the Act and the Regulations may be somewhat different than the burden of collecting and remitting sales and use taxes, the sole purpose of the burdens imposed by the Act and the

Regulations may be somewhat different than the burden of collecting and remitting sales and use taxes, the sole purpose of the burdens imposed by the Act and the Regulations is the ultimate collection of use taxes when sales taxes cannot be collected. Looking to the practical effect of the Act and the Regulations, I conclude that the burdens imposed by the Act and the Regulations are inextricably related in kind and purpose to the burdens condemned in *Quill*. The Act and the Regulations impose these burdens on out-of-state retailers who have no connection with Colorado customers other than by common carrier or the United States mail. Those retailers likely are protected from such burdens on interstate commerce by the safe-harbor established in *Quill*.

iii. Conclusion

I find and conclude that the DMA has demonstrated a substantial likelihood of success on both its discrimination claims and its undue burden claim under the dormant Commerce Clause. Thus, consideration of this first factor weighs in favor of the issuance of a preliminary injunction.

B. IRREPARABLE INJURY

The parties dispute whether or not a deprivation of the Commerce Clause rights at issue here, without more, constitutes irreparable injury. In a recent case, the United States Court of Appeals for the Tenth Circuit indicated that violation of Commerce Clause rights constitutes irreparable injury. *American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 2010) (citing *American Libraries Ass'n v. Pataki*, 969 F.Supp. 160, 168 – 183 (S.D.N.Y. 1997)). Although the Tenth Circuit's statement in *Johnson* is dicta, I conclude that the constitutional Commerce Clause rights of DMA's members constitutes irreparable injury.

In addition, it is undisputed that many DMA members will face compliance costs if they are required to comply with the Act and the Regulations in the future. The amount of those costs is disputed. Huber's expert concludes that the smallest retailers affected by the Act and the Regulations will incur first-year compliance costs ranging from about 3,100 dollars to 7,000 dollars. *Response* [#50], Exhibit 6 (Report of Dieter G. Gable), p.2. If, in the end, the Act and the Regulations are found to be unconstitutional because they violate the Commerce Clause, the affected retailers would be unable to recover these compliance costs from the State of Colorado. Under the Eleventh Amendment, Colorado is immune from suit for such damages. Under these circumstances, the compliance costs faced by retailers subject to the Act and the Regulations constitute irreparable injury. *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 770 – 771 (10th Cir. 2010) (compliance costs of more than a thousand dollars per year per business constitute irreparable injury if such costs cannot later be recovered because of sovereign immunity). Thus, consideration of this second factor weighs also in favor of the issuance of a preliminary injunction.

C. BALANCE OF HARMS

When considering the balance of harms, a court must balance "the competing claims of injury and must consider the effect on each part of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Gambill*, 480 U.S. 531, 542 (1987). The DMA argues that the need to protect the constitutional rights of certain of its members outweighs the interest of the State of Colorado in enforcing a law that likely is constitutionally infirm. In addition, absent an injunction, some DMA members will incur compliance costs that cannot later be recovered. Huber argues that these considerations do not outweigh Colorado's interest in enforcing a state law that will provide revenue to its strapped coffers.

If, ultimately, the Act and the Regulations are upheld against the DMA's challenge, the reports and notices required by the Act and the Regulations can be prepared and delivered. This might delay the state's collection of some use taxes, but it will not prevent the ultimate collection of those taxes. On the other hand, preserving the status quo with a preliminary injunction will prevent the irreparable injuries discussed above while the issues raised by the DMA are resolved completely. Given these circumstances and considerations, I find and conclude that the balance of harms favors the DMA, and thus, the issuance of a preliminary injunction.

D. PUBLIC INTEREST

Generally, the public interest is served by enjoining the enforcement of a law that likely violates the Constitution. *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010). Huber argues that it is not in the public interest to enjoin the enforcement of a law which has the primary goal of raising revenue to ensure the fiscal well-being of the state. As Huber notes, a court of equity must "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter v. Natural Resources Defense*

Council, Inc., 555 U.S. 7, ___, 129 S.Ct. 365, 376 – 377 (U.S. 2008). I find and conclude that the public's interest in revenue raising by the state will not be impaired substantially by the issuance of a preliminary injunction. At most, the state may suffer some delay in implementing its new technique for enforcing its use tax laws, if the Act and the Regulations are upheld against the DMA's challenge. On the other hand, the enforcement of a law that likely is unconstitutional, even if the goal of the law is important and legitimate, does not serve the public interest. Thus, the public interest factor weighs in favor of the issuance of a preliminary injunction.

V. ORDERS

THEREFORE, IT IS ORDERED as follows:

1. That the Plaintiff's Motion for a Preliminary Injunction and Incorporated Memorandum of Law [#15] filed August 13, 2010, is **GRANTED** on the following terms;

2. That effective forthwith defendant Roxy Huber, in her capacity as Executive Director, Colorado Department of Revenue, together with her agents, servants, employees, attorneys-in-fact, or anyone acting on their behalf, are **ENJOINED AND RESTRAINED** from enforcing the provisions of § 39-21-112(3.5), C.R.S. (2010) (the Act) and the regulations promulgated thereunder, 1 Colo. Code Regs. § 201-1:39-21-112.3.5 (2010) (the Regulations), to the extent that the Act and the Regulations require

A. that a retailer must notify their Colorado customers that the retailer does not collect Colorado sales tax and, as a result, the purchaser is obligated to self-report and pay use tax to the Colorado Department of Revenue (Transactional Notice); and

B. that a retailer must provide to each of its Colorado customers an annual report detailing that customer's purchases from the retailer in the previous calendar year, informing the customer that he or she is obligated to report and pay use tax on such purchases, and informing the customer that the retailer is required by law to report the customer's name and the total amount of the customer's purchases from that retailer to the Colorado Department of Revenue (Annual Purchase Summary); and

C. that a retailer must provide the Colorado Department of Revenue with an annual report concerning each of the retailer's Colorado customers stating the name, billing address, shipping addresses, and the total amount of purchases from the retailer by each of the retailer's Colorado customers (Customer Information Report;

3. That this preliminary injunction **SHALL LIMIT** the enforcement of the Act and the Regulations against retailers who sell to customers in Colorado, but whose only connection to the State of Colorado is by common carrier or the United States Mail;

4. That this preliminary injunction **SHALL NOT LIMIT** the enforcement of the Act and the Regulations against retailers who do not fall into the class of retailers defined in paragraph three (3), above;

5. That under Fed. R. Civ. P. 65(c), the plaintiff, the Direct Marketing Association, **SHALL POST** with the Clerk of the Court a bond in the amount of five thousand (5,000) dollars on or before Friday, January 28, 2011, at 12:00 p.m. (mountain standard time); and

6. That this preliminary injunction **SHALL REMAIN IN EFFECT** until modified or rescinded by further order of the court.

Dated January 26, 2011, at Denver, Colorado.

BY THE COURT:

Robert E. Blackburn
United States District Judge

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

DIRECT MARKETING ASSOCIATION,
Plaintiff – Appellee,

v. No. 12-1175

BARBARA BROHL, in her capacity as
Executive Director, Colorado Department
of Revenue,
Defendant – Appellant,

and

MULTISTATE TAX COMMISSION,
Amicus – Curiae.

October 1, 2013

ORDER

Before **BRISCOE**, Chief Judge, **GORSUCH** and **MATHESON**, Circuit Judges.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

28 U.S.C.A. § 1341 provides:

§ 1341. Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

COLO. REV. STAT. § 39-21-112 provides in relevant part:

§ 39-21-112. Duties and powers of executive director

* * *

(3.5)(a) If any retailer that does not collect Colorado sales tax refuses voluntarily to furnish any of the information specified in subsection (1) of this section when requested by the executive director of the department of revenue or his or her employee, agent, or representative, the executive director, by subpoena issued under the executive director's hand, may require the attendance of the retailer and the production by him or her of any of the foregoing information in the retailer's possession and may administer an oath to him or her and take his or her testimony. If the retailer fails or refuses to respond to said subpoena and give testimony, the executive director may apply to any judge of the district court of the state of Colorado to enforce such subpoena by any appropriate order, including, if appropriate, an attachment against the retailer as for contempt, and upon hearing, said judge has, for the purpose of enforcing obedience to the requirements of said subpoena, power to make such order as, in his or her discretion, he or she deems consistent with the law for punishment of contempts.

(b) For purposes of this subsection (3.5), "retailer" shall have the same meaning as set forth in section 39-26-102(8).

(c)(I) Each retailer that does not collect Colorado sales tax shall notify Colorado purchasers that sales or use tax is due on certain purchases made from the retailer and that the state of Colorado requires the purchaser to file a sales or use tax return.

(II) Failure to provide the notice required in subparagraph (I) of this paragraph (c) shall subject the retailer to a penalty of five dollars for each such failure, unless the retailer shows reasonable cause for such failure.

(d)(I)(A) Each retailer that does not collect Colorado sales tax shall send notification to all Colorado purchasers by January 31 of each year showing such information as the Colorado department of revenue shall require by rule and the total amount paid by the purchaser for Colorado purchases made from the retailer in the previous calendar year. Such notification shall include, if available, the dates of purchases, the amounts of each purchase, and the category of the purchase, including, if known by the retailer, whether the purchase is exempt or not exempt from taxation. The notification shall state that the state of Colorado requires a sales or use tax return to be filed and sales or use tax paid on certain Colorado purchases made by the purchaser from the retailer.

(B) The notification specified in sub-subparagraph (A) of this subparagraph (I) shall be sent separately to all Colorado purchasers by first-class mail and shall not be included with any other shipments. The notification shall include the words "Important Tax Document Enclosed" on the exterior of the mailing. The notification shall include the name of the retailer.

(II)(A) Each retailer that does not collect Colorado sales tax shall file an annual statement for each purchaser to the department of revenue on such forms as are provided or approved by the department showing the total amount paid for Colorado purchases of such purchasers during the preceding calendar year or any portion thereof, and such annual statement shall be filed on or before March 1 of each year.

(B) The executive director of the department of revenue may require any retailer that does not collect Colorado sales tax that makes total Colorado sales of more than one hundred thousand dollars in a year to file the annual statement described in sub-subparagraph (A) of this subparagraph (II) by magnetic media or another machine-readable form for that year.

(III)(A) Failure to send the notification required in subparagraph (I) of this paragraph (d) shall subject the retailer to a penalty of ten dollars for each such failure, unless the retailer shows reasonable cause for such failure.

(B) Failure to file the annual statement required in sub-subparagraph (A) of subparagraph (II) of this paragraph (d) shall subject the retailer to a penalty of ten dollars for each purchaser that should have been included in such annual statement, unless the retailer shows reasonable cause for such failure.

* * *

1 COLO. CODE REGS. § 201-1:39-21-112.3.5 provides:

201-1:39-21-112.3.5

1) Definitions

a) "Retailer that does not collect Colorado sales tax"

i) A retailer that does not collect Colorado sales tax is a retailer that sells goods to Colorado purchasers and that does not collect Colorado sales or use tax. Such retailers are also referred to in this regulation as "non-collecting retailers"

ii) A "retailer that does not collect Colorado sales tax" does not include a retailer that makes sales in Colorado solely by means of download of digital goods or software. A "retailer that does not collect Colorado sales tax" does include a retailer that makes sales in Colorado both by means of download of digital goods or software and by means of shipping or otherwise physically delivering goods to a Colorado purchaser.

iii) A "retailer that does not collect Colorado sales tax" does not include a retailer whose sales in Colorado are de minimis. For purposes of this regulation, the Department will presume that a retailer that makes less than $100,000 in total gross sales in Colorado in the prior calendar year and reasonably expects total gross sales in Colorado in the current calendar year will be less than $100,000 is a retailer whose sales in Colorado are de minimis.

b) "Colorado purchaser"

i) With respect to sales of goods that are shipped, a Colorado purchaser is a purchaser that requests the goods be shipped to Colorado. In the case of a purchase that is purchased by one party, who may be inside or outside of Colorado, and shipped to a party in Colorado, the Colorado purchaser is the purchaser of the goods, not the recipient of the goods.

ii) With respect to sales of goods that are downloaded or otherwise delivered electronically

(1) If the purchaser provides a "bill to" address, then a Colorado purchaser is a purchaser whose "bill to" address is in Colorado;

(2) If the purchaser does not provide a "bill to" address, then the non-collecting retailer shall make a determination as to whether a purchaser is in Colorado, and is therefore a Colorado purchaser, using any other commercially reasonable method

based on the business's existing billing, customer-tracking, or other systems.

c) "Colorado purchase"

i) With respect to sales of goods that are shipped, a Colorado purchase is one that is shipped to Colorado.

ii) With respect to sales of goods that are downloaded or otherwise delivered electronically

(1) If the purchaser provides a "bill to" address, then a Colorado purchase is one for which the "bill to" address is in Colorado;

(2) If the purchaser does not provide a "bill to" address, then the non-collecting retailer shall make a determination as to whether a purchase is a Colorado purchase using any other commercially reasonable method based on the business's existing billing, customer-tracking, or other systems.

iii) A Colorado purchase shall not include any purchases or rentals of VHS tapes, DVDs, Blu-Ray disks, or other video materials to the extent that disclosure of the purchasers of such items would violate 18 U.S.C. 2710.

d) "Department" -- the term Department refers to the Colorado Department of Revenue.

e) "Total gross sales" -- As used in this regulation, the term total gross sales means the total sales of goods. The term shall not include sales of services. The term shall include all sales of goods made by all entities controlled by or under common control with the non-collecting retailer.

2) Obligation to give notice with each purchase

a) A non-collecting retailer must give notice to all Colorado purchasers that Colorado sales or use tax is due on all purchases that are not exempt from sales tax. This notice must be provided with respect to each transaction.

i) A non-collecting retailer may not display or imply that no tax is due on any Colorado purchase, unless such a display is accompanied by the notice required by this paragraph 2) each time the display appears.

(1) Example: A summary of the transaction including a line designated "Sales tax" and showing the amount of sales tax as "zero" or "0.00" would constitute a "display" implying that no tax is due on the purchase. Such a display must be accompanied by the notice required by this paragraph 2) every time it appears.

(2) Notwithstanding the limitation in this paragraph i), if a non-collecting retailer knows that a purchase is exempt from Colorado tax pursuant to Colorado law, the non-collecting retailer may display or indicate that no sales tax is due even if such display is not accompanied by the notice required by this paragraph 2).

ii) In calculating the total price due to the retailer, a non-collecting retailer may display a designation that no tax is being collected by the retailer or may entirely omit any reference to sales tax. In this case, the notice required by this paragraph 2) shall be sufficient if it appears on each invoice or, if no invoice is provided, if it is otherwise given to the purchaser as part of the sale, either immediately before, as part of, or immediately after the sale.

(1) Example: A non-collecting retailer may display a summary of the transaction with a line designated "Sales tax collected by [name of retailer]" and showing the amount collected as "zero" or "0.00" or any other designation indicating that no sales tax is being collected. In this case, the non-collecting retailer may provide the required notice only on the invoice or immediately before, as part of, or immediately after the sale.

b) The notice required by this paragraph 2) shall contain the following information:

i) The non-collecting retailer does not collect Colorado sales or use tax;

ii) The purchase is not exempt from Colorado sales or use tax merely because it is made over the Internet or by other remote means;

iii) The State of Colorado requires that a Colorado purchaser (A) file a sales or use tax return at the end of the year reporting all of the taxable Colorado purchases that were not taxed and (B) pay tax on those purchases;

c) The notice required by this paragraph 2) may contain the following additional information:

i) The retailer will provide an end-of-year summary of Colorado purchases to the customer in order to assist purchasers in filing their tax report;

ii) Details of how and when to file this return may be found at the Colorado Department of Revenue's website, www.taxcolorado.com. The notice may substitute a more specific url when such more specific url is published by the Department;

iii) The retailer is required by law to provide the Colorado Department of Revenue with an annual report of the total dollar amount of all of a Colorado purchaser's Colorado purchases at the end of the year. The retailer will not provide any other details of the transaction to the Department other than the amount of the purchase.

d) This notice must be clearly legible, reasonably prominent, and located in close proximity to the total price. It shall be sufficient if the non-collecting retailer provides a prominent linking notice that reads as follows: "See important sales tax information regarding the tax you may owe directly to your state", if such linking notice directs the Colorado purchaser to the principal notice required by this paragraph 2).

e) If the retailer is required to provide a similar notice for another state in addition to Colorado, and the retailer provides a single such notice to all purchasers with respect to items purchased for delivery in all states, the notice required by this paragraph 2) shall be sufficient if it contains substantially the information required in a form that is generalized to any state.

f) Penalties --

i) The non-collecting retailer shall pay a penalty of $5 for each sale to a Colorado purchaser with respect to which the notice required by this paragraph 2) does not appear.

ii) The penalty assessed against a single non-collecting retailer in a single year pursuant to this section shall not exceed the following amounts:

(1) For a non-collecting retailer that had no actual knowledge of the requirement and began to provide the required notices within 60 days of demand by the Department, $5,000;

(2) For a non-collecting retailer that failed to provide the notices for the first calendar year for which the non-collecting retailer was obligated to provide the notices, $50,000;

(3) For a non-collecting retailer that sells only goods that are not taxable in Colorado or sells goods only to purchasers that are not subject to sales or use tax, no penalty shall be collected.

iii) The Executive Director of the Department may waive all or any portion of the penalty for other reasonable cause shown.

3) Obligation to give Colorado purchasers notice of Colorado purchases

a) A non-collecting retailer must give an annual notice to all Colorado purchasers summarizing the

Colorado purchaser's Colorado purchases for the preceding calendar year. The notice shall meet the following requirements:

i) The notice must be sent by first class mail to the last known address of the purchaser as described in paragraph vii) of this paragraph a). The envelope containing the notice must be prominently marked with the words "Important tax document enclosed";

ii) The notice must summarize the date(s) of purchase(s), a description of the type of item(s) purchased (e.g., books, food, consumer electronics, household appliances), and the dollar amount(s) of the purchase(s);

iii) The notice must also state that the State of Colorado requires that the consumer file a sales or use tax return at the end of every year and pay tax on all taxable Colorado purchases for which no tax has been collected by the retailer. The notice may state that details of these requirements, including how to file, may be found at the Colorado Department of Revenue's website, www.taxcolorado.com. The notice may substitute a more specific url when such more specific url is published by the Department;

iv) The notice must also indicate that the non-collecting retailer is required by law to provide the Colorado Department of Revenue with the total dollar amount of purchases made by the Colorado purchaser, however no information about the purchase other than the dollar amount of the purchase will be provided to the Department;

v) If known to the non-collecting retailer, the notice may also indicate whether an item is exempt from Colorado sales tax; however no non-collecting retailer is required to include such information;

vi) The notice must be sent by January 31st of each year summarizing purchases made for the prior calendar year.

vii) Last known address of the purchaser:

(1) The non-collecting retailer may maintain a notice address for the purchaser, in which case, the non-collecting retailer may send the notice required by this paragraph 3) to such notice address if the following conditions are met:

(a) The non-collecting retailer informs the purchaser that the non-collecting retailer will be providing an end of year notice to the taxpayer as described in this paragraph 3);

(b) The non-collecting retailer informs the purchaser that the purchaser may choose to have the notice required by this paragraph 3) sent to a different address than the billing address (a "notice address");

(c) The purchaser acknowledges that he or she understands the tax obligation described in the notice and wishes to have the notice sent to a different address than the billing address and provides such a notice address.

(2) If the above conditions have not been met and no billing address for the customer has been provided, then the non-collecting retailer shall send the notice

required by this paragraph 3) to the purchaser's shipping address.

(3) If no billing address and no shipping address for the customer has been provided and no other physical address for the purchaser is known using any other commercially reasonable method based on the business's existing billing, customer-tracking or other systems, then the non-collecting retailer shall send the notice required by this paragraph 3) to the most recent e-mail address the non-collecting retailer has for the purchaser.

b) If the retailer is required by another state to provide a similar notice, and the retailer provides a single such notice to all purchasers with respect to items purchased for delivery in all states, the notice required in subparagraph a) shall be sufficient if it contains substantially the information required in a form that is generalized to any state.

c) De minimis Colorado purchaser --

i) Any non-collecting retailer that is required to send the notice required by this paragraph 3) to Colorado purchasers and that has complied with paragraph iii) of this paragraph c), is not required to send the notice required by this paragraph 3) to any Colorado purchaser whose total Colorado purchases for the prior calendar year are less than $500;

ii) If the goods purchased are not subject to Colorado use tax, a non-collecting retailer may choose to exclude such purchases from the calculation in paragraph i) of this paragraph c), however, no non-collecting retailer is obligated to do so;

iii) Any non-collecting retailer wishing to take advantage of the limitation in paragraph i) of this paragraph c) must make commercially reasonable business efforts, based on the business's existing billing, customer-tracking, or other systems, to identify multiple purchases made by a single Colorado purchaser.

d) Penalties

i) The non-collecting retailer shall pay a penalty of $10 for each notice required by this paragraph 3) that is not sent by the non-collecting retailer to the Colorado purchaser.

ii) The penalty assessed against a single non-collecting retailer pursuant to this section shall not exceed the following amounts:

(1) For a non-collecting retailer that sent the notices within 30 days after the due date, $1,000;

(2) For a non-collecting retailer that had no actual knowledge of the requirement and sent the notices within 60 days after demand by the Department of Revenue to issue such notices, $10,000;

(3) For a non-collecting retailer that failed to send the notices for the first calendar year for which the non-collecting retailer was obligated to send the notices, $100,000;

(4) For a non-collecting retailer that sells only goods that are not taxable in Colorado or sells goods only to

purchasers that are not subject to sales or use tax, no penalty shall be collected.

iii) The Executive Director of the Department may waive all or any portion of the penalty for other reasonable cause shown.

4) Obligation to give the Department notice of purchases made by Colorado purchasers

a) Any non-collecting retailer who is required to provide a notice described in paragraph 3) must file a report with the Department containing the following information:

i) The name of each Colorado purchaser;

ii) The billing address of each Colorado purchaser, if the information was provided to the non-collecting retailer;

iii) The shipping address of each Colorado purchaser, if the information was provided to the non-collecting retailer;

iv) The total dollar amount of Colorado purchases made by each Colorado purchaser during the prior calendar year. No other information about the purchase shall be provided.

b) If the non-collecting retailer has more than one Colorado billing address or more than one Colorado shipping address for a Colorado purchaser, then the non-collecting retailer shall provide all such addresses of the Colorado purchaser.

c) If the non-collecting retailer made more than $100,000 worth of total gross sales in Colorado during the prior calendar year, the non-collecting retailer shall electronically send the data required by this paragraph 4). If the non-collecting retailer made less than $100,000 worth of sales in Colorado during the prior calendar year, the non-collecting retailer may electronically send the data required by this paragraph 4). The Department of Revenue shall publish on its website by November 1st of each year the required format and data elements of the report and shall publish details of how the report file is to be transmitted to the Department.

d) Any non-collecting retailer that is not required to send any notices pursuant to paragraph 3) of this rule is also exempt from the requirements to send the report described in this paragraph 4).

e) If a non-collecting retailer is required to provide any notices pursuant to paragraph 3) of this rule, then such non-collecting retailer must include all the purchases made by all Colorado purchasers in its report, including any purchases made by de minimis Colorado purchasers.

f) Penalties

i) If a non-collecting retailer fails to file the report required by this paragraph (4), the non-collecting retailer shall pay a penalty equal to $10 times the number of Colorado purchasers that should have been included in the report.

ii) The penalty assessed against a single non-collecting retailer in a single year pursuant to this section shall not exceed the following amounts:

(1) For a non-collecting retailer that filed the report within 30 days of the due date, $1,000;

(2) For a non-collecting retailer that had no actual knowledge of the requirement and filed the report within 60 days of demand by the Department that the report be filed, $10,000;

(3) For a non-collecting retailer that failed to file the report for the first calendar year for which the non-collecting retailer was obligated to file the report, $100,000;

(4) For a non-collecting retailer that sells only goods that are not taxable in Colorado or sells goods only to purchasers that are not subject to sales or use tax, no penalty shall be collected.

iii) The Executive Director of the Department may waive all or any portion of the penalty for other reasonable cause shown.

OPPOSITION
BRIEF

Supreme Court, U.S.
FILED
JUN - 6 2014
OFFICE OF THE CLERK

No. 13-1032

In The
Supreme Court of the United States

DIRECT MARKETING ASSOCIATION,

Petitioner,

v.

BARBARA BROHL, IN HER CAPACITY AS EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF REVENUE,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

The Tax Injunction Act, 28 U.S.C. § 1341 ("TIA"), provides that "the federal district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Because it found that Colorado's law was enacted to ensure compliance with and increase collection of the use tax and that the challenge by the Direct Marketing Association ("DMA") would restrain the State's collection of that tax, the Tenth Circuit Court of Appeals held the TIA divested the federal courts of jurisdiction. The Tenth Circuit also determined that principles of comity compelled dismissal in deference to the state adjudicative process.

The Tenth Circuit's ruling presents the following questions:

1. Does the TIA bar federal district courts from hearing suits that seek to enjoin a state's chosen method of collecting an undisputedly lawful tax when there exists a plain, speedy, and efficient state court remedy?
2. Do principles of comity compel dismissal of federal claims for relief that seek to have a state's chosen tax collection method enjoined and declared unconstitutional?

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INTRODUCTION

This case presents a poor vehicle for the reexamination of the proper scope of the TIA and comity doctrine. As the DMA acknowledges, neither party fully briefed the issues presented by its petition in the courts below. Concurrent with its petition in this Court, the DMA filed nearly identical claims in a Colorado state court, and that court has preliminarily enjoined Colorado's law. This Court has long recognized both that state courts are equipped to hear constitutional challenges and that they are best suited to do so when a state's method of tax collection is challenged and state tax revenue is put in jeopardy.

The Tenth Circuit's decision is consistent with this Court's TIA precedent and there is no split of authority amongst the circuits requiring clarification from this Court. Because the DMA's claims strike at the heart of Colorado's tax collection authority, both the TIA and comity preclude the federal district court's jurisdiction where, as here, a plain, speedy, and efficient state court remedy exists.

STATEMENT OF THE CASE

1. **Colorado Sales and Use Tax.** Colorado enacted a sales tax in 1935 and a complementary use tax in 1937. Use tax has long been due on the storage, usage, or consumption of tangible property within Colorado when sales tax has not been paid. COLO. REV. STAT. § 39-26-202 (2013). The use tax aims to

capture lost sales tax revenue when sales are diverted outside the state or are accomplished remotely, as through catalog purchases or the Internet.

The purpose of a complementary sales and use tax scheme is to make all tangible property used or consumed in the state subject to a uniform tax burden, regardless of whether it is acquired within or without the state. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 66 (1963). Although the use tax, viewed in isolation, is facially discriminatory, this Court long ago determined that when paired with a sales tax of the same rate, it does not run afoul of the dormant Commerce Clause. *Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577 (1937).

Colorado requires retailers doing business in the state to collect sales tax from consumers at the time of the transaction. Those retailers are themselves liable for the sales tax even if they do not actually collect the tax from consumers, and must comply with a series of requirements: obtain a license, determine whether any exemptions apply to a particular sale, calculate the state and local sales tax due for each sale, collect the tax at the time of the transaction, file a return, remit the tax collected to the state, and maintain records. *See* COLO. REV. STAT. §§ 39-26-101 to -127 (2013). Collecting retailers may be subject to criminal penalties if they fail to collect and remit. COLO. REV. STAT. § 39-21-118(2) (2013).

However, as a result of two decisions from this Court, these burdens associated with state sales and use tax *collection* may be required only of those retailers with a physical presence within the state. *Quill Corp. v. N.D.*, 504 U.S. 298 (1992); *Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967). Thus, national retailers with locations in Colorado, like Home Depot or Target, must collect and remit sales tax on their online or other remote sales. Internet and mail-order companies with no physical presence in the state, like Amazon.com or L.L. Bean, are not required to do so. Instead, consumers who purchase from remote retailers are required to remit the owed use tax to the State at the time of their annual income tax return. However, as the Tenth Circuit noted, voluntary consumer compliance with the use tax is extremely weak. App. at A-5.

2. **Colorado's Law.** Modeled after third party information returns like I.R.S. Form 1099, which promote voluntary compliance with income tax requirements, Colorado enacted legislation in 2010 to address the dual problem of weak consumer use tax compliance and the ballooning tax gap caused by the explosion of E-commerce and remote retail sales. C.A. App. 1757-90. The law provides non-collecting retailers (typically remote, out-of-state retailers) the choice between collecting the sales or use tax, just like in-state retailers and national retailers with a physical presence, or, complying with three information reporting requirements (collectively, "Colorado's law"). App. at E-1 – E-4.

First, non-collecting retailers must notify Colorado purchasers that, although the retailer is not collecting sales tax, the purchase may be subject to Colorado's use tax (the "Transactional Notice"). COLO. REV. STAT. § 39-21-112(3.5)(c)(I) (2013); 1 COLO. CODE REGS. § 201-1:39-21-112.3.5(2). The Transactional Notice serves to educate consumers about their state use tax liability with the aim of increasing voluntary compliance.

Second, non-collecting retailers must send Colorado customers who purchase more than $500 from the retailer in a year an annual summary listing the dates, general categories, and amounts of their purchases and reminding them of their use tax obligation (the "Annual Purchase Summary"). COLO. REV. STAT. § 39-21-112(3.5)(d)(I) (2013); 1 COLO. CODE REGS. § 201-1:39-21-112.3.5(3). The Annual Purchase Summary arms the consumer with accurate information to facilitate reporting and paying the use tax.

Third, non-collecting retailers must send an annual report to the Colorado Department of Revenue ("the Department") listing only customer names, addresses, and total amounts spent (the "Customer Information Report"). COLO. REV. STAT. § 39-21-112(3.5)(d)(II) (2013); 1 COLO. CODE REGS. § 201-1:39-21-112.3.5(4). The Customer Information Report both allows the Department to pursue audit and collection actions against taxpayers who fail to pay the tax and increases voluntary consumer compliance with state tax laws because consumers know that a third party has reported their taxable activity to the taxing authority. *See generally* Leandra Lederman, *Reducing Information Gaps to Reduce the Tax Gap: When is*

Information Reporting Warranted?, 78 FORDHAM L. REV. 1733, 1738-39 (March 2010) (comparing third party information reporting to red light cameras "spurring compliance in the first instance").

The estimated annual revenue associated with Colorado's law as adopted is high – initially estimated to be $12.5 million for fiscal year 2011-12 and expected to increase over time as awareness of Colorado's law and enforcement increase. C.A. App. 2084, 2116-19.

3. **The DMA's Challenge.** Shortly after the passage of Colorado's law in 2010, the DMA filed suit in the United States District Court for the District of Colorado against the Executive Director of the Department, the state's chief authority for collecting taxes and enforcing the state's tax laws. *See* COLO. REV. STAT. § 24-35-102(2) (2013). The DMA asserted eight counts against the Department, including two counts under the Commerce Clause, seeking injunctive and declaratory relief to permanently enjoin enforcement of Colorado's law. C.A. App. 11-43, 46-83. The Department moved to dismiss all counts except those under the Commerce Clause.[1] C.A. App. 3204-39.

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[1] Recognizing Colorado's law was the first of its kind in the country and that many states were contemplating similar legislation, the Department did not challenge the federal district court's jurisdiction on TIA grounds and, instead, agreed to seek an expedited ruling on the merits of the Commerce Clause challenge. As the Tenth Circuit acknowledged, the DMA's claims differ from the prototypical TIA lawsuit. App. at A-18. At this juncture, however, the Department opposes continuing federal

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The DMA moved for a preliminary injunction solely on the Commerce Clause counts. C.A. App. 84-114. The parties agreed to engage in limited factual discovery, including expert discovery, related to the Commerce Clause counts, and to defer discovery on the remaining counts. The district court found the DMA had a likelihood of success on the merits under the Commerce Clause and granted its motion for a preliminary injunction. App. at C-1 – C-17.

At the parties' joint request, the district court approved a briefing schedule for cross-motions for summary judgment on the Commerce Clause counts and stayed all proceedings on the remaining counts. C.A. App. 1669-74, 1677-79. Given this stipulated briefing schedule, the district court denied without prejudice the Department's motion to dismiss as to the non-Commerce Clause counts and authorized the Department to renew its motion after full resolution of the Commerce Clause counts. C.A. App. 3295.

The district court ultimately granted the DMA's motion for summary judgment, denied the Department's summary judgment motion, and permanently

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court jurisdiction. As detailed *infra*, the DMA has filed the same claims in Colorado state court and is actively availing itself of its state court remedies. The lack of full briefing on the TIA in the lower courts also counsels against review by this Court. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) (declining to address issue not fully briefed in lower courts). Further federal court jurisdiction is not warranted.

enjoined the Department from enforcing Colorado's law. App. at B-1 – B-25.

On appeal, the Department urged reversal on the merits but nonetheless pointed out the potential jurisdictional impact of the TIA. Appellant's Op. Br. at 31 n.3. The Tenth Circuit vacated the district court's judgment but refrained from addressing the merits of the district court's Commerce Clause analysis. Rather, it concluded the TIA divested the federal courts of jurisdiction over the DMA's suit. App. at A-10 – A-32. Central to the appellate court's reasoning was that the DMA's requested relief, if granted, would "restrain" Colorado's collection of state tax. App. at A-16 (quoting TIA, 28 U.S.C. § 1341). The Tenth Circuit also determined that principles of comity compelled dismissal in deference to the state adjudicative process. A-33 n.11.

The Tenth Circuit denied the DMA's petition for rehearing en banc on October 1, 2013. App. at D-1 – D-2. On December 10, 2013, the district court issued an order dissolving the permanent injunction and dismissing the DMA's Commerce Clause claims. The DMA filed its petition for writ of certiorari in this Court on February 25, 2014.

Meanwhile, on November 5, 2013, months before filing its petition with this Court, the DMA filed a Colorado state court case against the Department, asserting nearly identical claims for relief that were brought in federal court. On February 18, 2014, the Colorado state district court entered a preliminary injunction barring enforcement of Colorado's law. *See Direct Marketing Ass'n v. Colo. Dep't of Revenue*, No. 13CV34855 (Denver Dist. Ct. Feb. 18, 2014). Significantly, the Colorado state district court declined to stay the state case while the DMA's petition for writ of certiorari is pending in this Court. As a result, several years after first litigating the constitutionality of Colorado's law, the parties are again preparing discovery on the same issues in the state court proceedings. Discovery, as well as briefing, on cross motions for summary judgment on the DMA's discrimination claim under the Commerce Clause, should be completed in July 2014.

SUMMARY OF THE ARGUMENT

The DMA's petition for writ of certiorari should be denied. Consistent with this Court's longstanding admonition that federal district courts should not interfere with the modes adopted by the states to enforce and collect state taxes, the Tenth Circuit determined that the DMA's claims for injunctive and declaratory relief were barred by the TIA. The Tenth Circuit properly held the TIA precludes the federal district court's jurisdiction to hear the DMA's challenge to Colorado's law, which, if successful, would restrain the State's collection of use tax revenue undisputedly owed to the State. Because the jurisdictional bar of the TIA is not limited to suits brought by taxpayers challenging their own tax liability, but rather precludes any claim that would restrain a

State's collection of tax revenue, the Tenth Circuit correctly ordered the remand of the case for dismissal by the federal district court. The Tenth Circuit properly distinguished and declined to follow two outdated cases cited by the DMA in an attempt to identify a circuit split. Contrary to the DMA's suggestion, the Tenth Circuit's TIA analysis is consistent with the weight of circuit court authority and no split of authority exists requiring clarification from this Court. Likewise, principles of comity, as recognized by the Tenth Circuit, compel federal deference to the state adjudication of the DMA's challenge. There is no question that the DMA has an adequate state court remedy available and, indeed, has since availed itself of that remedy by obtaining a preliminary injunction of Colorado's law from the state court. Review by this Court is thus unwarranted.

REASONS FOR DENYING THE PETITION

I. The Tenth Circuit's decision is consistent with this Court's TIA precedent.

This Court has long recognized the danger of interfering with the administration of state tax systems. *See*, *e.g.*, *Dows v. City of Chicago*, 11 Wall. 108, 110 (1871) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the *modes adopted to enforce the taxes levied* should be interfered with as little as possible." (emphasis added)). The TIA was enacted to prevent interference by the lower federal courts with the assessment and collection of state taxes. *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982). Exceptions to this general rule are made only when a state court remedy is lacking. *Ark. v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 823 (1997); 28 U.S.C. § 1341 (requiring a "plain, speedy and efficient" state court remedy). The DMA does not contest the availability or adequacy of Colorado's remedies.[2]

Consistent with this Court's precedent, the Tenth Circuit properly held the DMA's claims were barred by the TIA because, although the association itself is not a taxpayer, the relief it requested would restrain the State's collection of the use tax.

A. The TIA's jurisdictional bar is not limited to suits brought by taxpayers challenging their own tax liability.

The TIA bars federal suits requesting relief that would have the effect of diminishing state tax revenue. *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 428 (2010). The TIA is "first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981). Contrary to the DMA's suggestion, *Hibbs v. Winn*, 542 U.S. 88 (2004) does not limit the application of this jurisdictional bar to suits brought by taxpayers seeking to avoid their own state tax liability.

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[2] The Tenth Circuit identified three adequate state remedies available to challenge Colorado's law and the DMA has not challenged that finding here. App. at A-26 – A-32; SUP. CT. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). Indeed, the DMA has availed itself of its proper remedy and, as indicated, the Colorado state district court has preliminarily enjoined the challenged provisions of the law.

Hibbs involved an Establishment Clause challenge to an Arizona tax credit allowed for contributions toward private religious schools. *Id.* at 95-96. The Court held the TIA did not preclude the federal district court's jurisdiction because the plaintiffs did not seek to impede the State's receipt of tax revenues. *Id.* at 93. The Court emphasized the "state-revenue-protective moorings" of the TIA. *Id.* at 106. Consequently, it distinguished taxpayer claims contesting state tax liability that would *reduce* state revenues if successful from third-party constitutional challenges to the award of tax benefits that would have the effect of *enlarging* state receipts. *Id.* at 108. Ultimately, the Court held the Establishment Clause challenge to Arizona's tax credit would have "no negative impact on tax collection" and thus did not implicate any of the TIA's underlying purposes. *Id.* at 94.

Here, the TIA precludes the federal district court's jurisdiction because the relief requested by the DMA would impede and diminish Colorado's collection of tax revenues. The Tenth Circuit recognized that collection of the use tax is "elusive" and that Colorado was estimated to lose $172.7 million in 2012 as a result of residents' failure to pay tax on remote E-commerce purchases. App. at A-5. The Colorado General Assembly adopted the notice and reporting requirements to increase taxpayers' compliance with Colorado's use tax and thereby increase use tax collection. App. at A-18.

Although the DMA does not challenge the imposition of the tax itself, it seeks to enjoin Colorado's chosen method of collecting the tax. Suits that would disrupt the collection of state tax revenue, however, cannot avoid the TIA's jurisdictional bar. *See*, *e.g.*, *Grace Brethren Church*, 457 U.S. at 417 (Congress did not intend federal district courts to have authority to issue declaratory or injunctive judgments to disrupt state tax administration).

Because the DMA's claims ask the federal court to interfere with the collection of state taxes and would negatively impact the collection of state tax revenue, they are barred by the TIA.[3]

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[3] This Court's holding in *Nat'l Fed. of Indep. Bus. v. Sebelius*, does not support the DMA's contention that its challenge to the penalty provisions of Colorado's law is beyond the scope of the TIA's jurisdictional bar. *See* 132 S.Ct. 2566, 2583-84 (2012) (finding that while Congress could have chosen to call the penalty a tax subjecting it to the Anti-Injunction Act, it did not). As is common in the tax context, Colorado's law imposes penalties upon retailers for failure to comply with the laws. *See, e.g.*, COLO. REV. STAT. § 39-21-112(3.5)(c)(II) & (d)(II) (2013) (penalties for

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B. The TIA bars federal court jurisdiction to enjoin or declare unconstitutional Colorado's method of collecting the use tax.

The DMA's claims strike at the heart of the State's tax collection authority and the federal district court's jurisdiction is thus barred by the TIA. The TIA is a "broad jurisdictional barrier." *Farm Credit Servs. of Cent. Ark.*, 520 U.S. at 825-26. This Court has recognized that "the States' interest in the integrity of their own processes is of particular moment respecting questions of state taxation," and "federal courts must guard against interpretations of the [TIA] which might defeat its purpose and text." *Id.* at 826-27. The TIA "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer is own fiscal operations." *LaSalle Nat'l Bank*, 450 U.S. at 522. Thus, the TIA prohibits federal courts from issuing declaratory or injunctive relief in state tax cases when an adequate state court remedy exists. *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 588 (1995).

In this case, the Tenth Circuit recognized the TIA bars not just suits that enjoin tax collection but also suits that would "*restrain* the collection" of a state

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retailers selling to Colorado customers who fail to comply with notice and reporting requirements); COLO. REV. STAT. § 39-21-116.5 (2013) (penalties for willful attempts to evade payment of a tax). These penalties are an integral part of the State's tax code and challenges to these penalties are likewise barred by the TIA.

tax. App. at A-16 (emphasis in original). Modeled after third party information reporting requirements in the income tax context, which have proven quite effective, the challenged notice and reporting requirements were adopted to improve voluntary tax compliance and increase the collection of revenue owed the state. C.A. App. 1797. The DMA challenges the State's chosen method to collect the use tax and not merely a "secondary aspect" of tax administration as the DMA suggests. Utilizing the common dictionary meaning of the word "restrain," the Tenth Circuit determined the DMA's claims, if successful, would limit, restrict, or hold back the State's ability to collect tax revenue. App. at A-17. The Tenth Circuit acknowledged that in *Hibbs* this Court rejected the argument that the TIA "immunizes" from federal court review "all aspects of state tax administration," 542 U.S. at 105. App. at A-21. But the Tenth Circuit appropriately distinguished the DMA's claims, which, if successful, would reduce the flow of state tax revenue, from those of the plaintiffs in *Hibbs*, which, if successful, would have increased state revenue.

The DMA's characterization of the notice and reporting requirements as coercive regulatory measures designed to indirectly increase the payment of taxes does not put its claims outside the reach of the TIA. "'[E]very tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed.'" *Nat'l Fed. of Indep. Bus.*, 132 S.Ct. at 2596 (quoting *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937)). Sales and use tax revenue typically represents one third of Colorado's annual general fund budget. C.A. App. 1930. Collection of this revenue is thus critical to the State. *See, e.g., Farm Credit Servs. of Cent. Ark.*, 520 U.S. at 826 ("The power to tax is basic to the power of the State to exist.") (citing *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)).

The Tenth Circuit correctly concluded that allowing the DMA's claims to proceed in federal court would defeat the purpose and text of the TIA when there are adequate state court remedies available to challenge the constitutionality of Colorado's law.[4]

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[4] This Court has consistently rejected the argument by amicus Council On State Taxation ("COST") that state courts are somehow less equipped to hear constitutional challenges. *See, e.g., Grace Brethren Church*, 457 U.S. at 418 n.37 ("[We] are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the . . . courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.") (quoting *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976)). Further, the citation by COST to the Tenth Circuit's decision in *Kerr v. Hickenlooper*, 744 F.3d 1156 (10th Cir. 2014), is inapposite. There, the plaintiffs, a group of state legislators, did not seek to enjoin or impede the State's collection of tax revenue; rather, the *Kerr* plaintiffs filed suit against the Governor challenging the State constitution's Taxpayer's Bill of Rights as a violation of the requirement that the states have a republican form of government. *Id.* at 1161.

II. The Tenth Circuit's decision is consistent with the weight of circuit authority.

The Tenth Circuit properly distinguished and declined to follow two outdated cases the DMA cites in an attempt to identify a circuit split: *Wells v. Malloy*, 510 F.2d 74 (2d Cir. 1975), and *United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003) ("*UPS I*"). The Tenth Circuit's decision is consistent with TIA precedent of the circuit courts.

A. *Wells* and *UPS I* pre-date *Hibbs* and did not involve challenges to a state's chosen method of tax collection.

In *Hibbs*, this Court confirmed the TIA is principally concerned with "state-revenue-protective objectives." 542 U.S. at 104. Little benefit is gained by granting certiorari to review the continuing vitality of two cases that preceded *Hibbs*. *Cf.* SUP. CT. R. 10(a).

Wells, dating from 1975, held that a challenge to Vermont's law requiring suspension of a taxpayer's driver's license for nonpayment of a vehicle tax was not barred by the TIA. 510 F.2d 74. The Second Circuit noted that Congress, in enacting the TIA, sought to remove federal jurisdiction over challenges to laws that "would produce money or other property directly, rather than indirectly through a more general use of coercive power." *Id.* at 77. Thus, the Second Circuit concluded, the TIA was no bar to the "unusual sanction" of a driver's license suspension. *Id.* Importantly, *Wells* itself recognized the critical revenue-raising objectives underlying the TIA, *see id.* at 77 n.5 (quoting Senate Report stating that federal taxpayer suits "seriously disrupt State and county finances"), but ultimately concluded those objectives were not hindered by exercising federal jurisdiction over the challenge to Vermont's licensing scheme.

Similarly, in *UPS I*, the plaintiffs did not challenge the tax or the authority of the Treasury Secretary to collect the tax. *UPS I* concerned Puerto Rico's analog to the TIA, the Butler Act, not the TIA itself. 318 F.3d at 330 (citing 48 U.S.C. § 872). But even if the two laws are comparable, Puerto Rico's law banning delivery of packages by third party interstate carriers absent certain conditions did "not seek to restrain a system that 'produces money or other property directly.'" *Id.* at 331 (quoting *Wells*, 510 F.2d at 77). Rather, like the Vermont law in *Wells*, Puerto Rico's law produced "tax money indirectly through a more general use of coercive power." *Id.* (internal quotation marks omitted). No "system of tax collection" within the meaning of the Butler Act was at issue. *Id.* The First Circuit distinguished the package delivery restrictions from cases where attacks on the State's method of tax collection were barred by the TIA. *Id.* at 331 n.12. Notably, the First Circuit later held that one discrete part of Puerto Rico's scheme (a licensing fee applicable to air carriers) was in fact a tax subject to the Butler Act and thus beyond the federal courts' jurisdiction. *United Parcel Serv., Inc. v. Flores-Galarza*, 385 F.3d 9, 14-15 (1st Cir. 2004) ("*UPS II*").

Here, the Tenth Circuit properly distinguished and declined to follow both *Wells* and *UPS I*. The court reasoned that Colorado's laws "are not a reactive and punitive 'general use of coercive power'" as was the case in *Wells* and *UPS I*. App. at A-23. Instead, Colorado's laws "attempt to ensure tax compliance in the first instance" by notifying consumers of their duty to pay use tax and garnering information on consumer purchasers to assist in later audits. *Id.* Such notice and reporting obligations, the Tenth Circuit held, have "revenue-generating" purposes because they constitute "the state's chosen means of enforcing use tax collection in the first instance." App. at A-25. Colorado's laws thus fit "squarely" within the TIA's ambit. App. at A-26.

Other circuits likewise recognize the revenue generating objectives of the TIA and, consequently, criticize *Wells* and *UPS I* as outdated. *See, e.g.*, *Sipe v. Amerada Hess Corp.*, 689 F.2d 396, 403 (3d Cir. 1982) (questioning whether *Wells* "survives the reasoning in more recent Supreme Court cases" and stating the "essential administrative mechanism" of unemployment tax withholding furthers TIA's policy of noninterference with state revenue collection). Even the more recent of the cases cited by the DMA, *UPS I*, has been superseded by later First Circuit precedent holding the TIA and Butler Act block suits that reduce the flow of state tax revenue. *Pleasures of San Patricio, Inc. v. Mendez-Torres*, 596 F.3d 1, 6-7 (1st

Cir. 2010) (citing *Hibbs*); *Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3, 13-14 (1st Cir. 2009) (same).[5]

Accordingly, review by this Court to reconcile a split of authority is not warranted.[6]

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[5] Still other cases limit *Wells* and its progeny to instances where the penalty for nonpayment is "an unusual sanction." *See Schneider Transport, Inc. v. Cattanach*, 657 F.2d 128, 134 (7th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982); *Huber Pontiac, Inc. v. Whitler*, 585 F.2d 817, 819 (7th Cir. 1978). Colorado's law imposes monetary penalties for failure to comply with the notice and reporting requirements – hardly an unusual sanction in the tax context. *See, e.g.*, 26 U.S.C. § 6552 (imposing various monetary penalties for failure to file certain information returns with I.R.S.).

[6] The Sixth Circuit decision in *BellSouth*, cited by amicus COST, does not conflict with the Tenth Circuit's decision. *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499 (6th Cir. 2008). *BellSouth* concerned a Kentucky law that prohibited telecommunications service providers from separately stating a new tax on consumer invoices. *Id.* at 501. The Sixth Circuit held that a First Amendment challenge by providers was not barred by the TIA since the providers were not seeking relief from the legal responsibility to pay the tax, there was no hindrance of the state's interest in collecting the tax, and an injunction, if granted, would not interfere with the relationship between the state and those who owed the tax. *Id.* at 501-02. But here, as the Tenth Circuit observed, the DMA's requested relief would "limit, restrict, or hold back the state's chosen method of enforcing its tax laws *and generating revenue*." App. at A-17 (emphasis added). *See also Washer & Refrigeration Supply Co., Inc. v. PRA Gov't Servs, LLC*, No. 2:09-CV-1111-WKW (WO), 2010 U.S. Dist. LEXIS 93576, *15-16 (M.D. Ala. 2010) (similarly distinguishing *BellSouth*). Because it did not address revenue-generating measures, *BellSouth* is not instructive.

B. The circuit courts consistently recognize the state revenue-protective moorings of the TIA.

The DMA's overarching premise – that the TIA is no bar to suits challenging a State's chosen method for collecting owed taxes – has been rejected by the circuit courts.

In *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722 (7th Cir. 2011) (en banc), the Seventh Circuit held the TIA barred the taxpayer casinos' claims seeking a constructive trust of taxes they paid because such relief would impede the State's collection of tax revenue. The court noted that although the State was not a party, the relief sought by the plaintiffs would "thwart the tax as surely as an injunction against its collection." *Id.* at 726.

In *Blangeres v. Burlington N., Inc.*, 872 F.2d 327 (9th Cir. 1989), the Ninth Circuit concluded the TIA barred an employee suit brought against the employer seeking to enjoin the employer from producing earnings records to the Idaho and Montana taxing authorities. In applying the TIA the court explained the requested relief, if granted, would render the states "unable to obtain the information necessary for [tax] assessment." *Id.* at 328. It was of no consequence that the employees' requested injunction would restrain assessment "indirectly rather than directly." *Id.*; *accord RTC Commercial Assets Trust 1995-NP3-1* *v. Phoenix Bond & Indem. Co.*, 169 F.3d 448, 454 (7th Cir. 1999).

The Ninth Circuit reached the same conclusion in *Jerron West, Inc. v. Cal. State Bd. of Equalization*, 129 F.3d 1334 (9th Cir. 1997), *cert. denied*, 525 U.S. 819 (1998). There, the taxpayers sought a federal court injunction to stay certain administrative tax proceedings pending before California's State Board of Equalization while ongoing criminal proceedings were also taking place. *Id.* at 1335-36. The court held the TIA precluded federal jurisdiction because the administrative tax proceedings "are an integral part of California's sales tax assessment and collection scheme." *Id.* at 1337.

The same is true in the Third Circuit. *See Gass v. County of Allegheny*, 371 F.3d 134 (3d Cir. 2004), *cert. denied*, 543 U.S. 987 (2004). In *Gass*, the court rejected the taxpayers' attempt to distinguish between the actual property tax (which they did not challenge) and the post-collection appeals process that they alleged denied them due process. *Id.* at 136-37. The court reasoned that "[t]he appeal process is directed to the Board's ultimate goal and responsibility of determining the proper amount of tax to assess – a power of 'assessment' that explicitly falls within the ambit of the Tax Injunction Act." *Id.*

Likewise, in *Amos v. Glynn County Bd. of Tax Assessors*, 347 F.3d 1249, 1255 (11th Cir. 2003), the Eleventh Circuit stated it was "undisputed" that a challenge to a county tax assessor's method of selectively re-evaluating certain upscale properties each year constituted a restraint on the state's tax assessment scheme, thus triggering the TIA. *See also Brooks v. Nance*, 801 F.2d 1237, 1239 (10th Cir. 1986) (holding TIA "cannot be avoided by an attack on the administration of a tax as opposed to the validity of the tax itself."); *Czajkowski v. Illinois*, 460 F. Supp. 1265, 1272 (N.D. Ill. 1977) (rejecting taxpayers' distinction between tax itself and the enforcement, administration, and implementation of the taxing scheme).

Thus, the weight of circuit court authority is inconsistent with the DMA's suggested narrow application of the TIA. Were it otherwise, *any* mechanism employed by the states to advance their important tax collection efforts (other than direct levy) would be thwarted by federal challenges. *Cf. Alcan Aluminum Ltd. v. Dep't of Revenue of the State of Or.*, 724 F.2d 1294, 1297 (7th Cir. 1984) (indicating importance of adhering to policies underlying the TIA and need to avoid a hypertechnical approach to the law). This Court should reject the DMA's artificial distinction between the use tax and Colorado's chosen method for enforcing and collecting the tax.

III. The doctrine of comity supports the Tenth Circuit's ruling that the DMA's claims should be dismissed in deference to the state adjudicative process.

The Tenth Circuit properly determined that, in addition to the TIA, the doctrine of comity militated in favor of dismissal of the DMA's claims. App. at A-33 n.11. Analyzing this Court's recent holding in *Levin*, the Tenth Circuit concluded comity "'compel[led] forbearance'" by the federal district court, noting the doctrine is more "embracive" than the TIA. App. at A-33 n.11 (alteration in original) (quoting *Levin*, 560 U.S. at 424). The Tenth Circuit determined all three factors discussed in *Levin* – the State's freedom over tax classifications versus more suspect classifications, the plaintiff's goal of improving their competitive position, and the state court's relative flexibility in correcting any violation – applied with similar force to the DMA's case. *Id.* The Tenth Circuit's conclusion is manifestly correct and should not be disturbed by this Court.[7]

As to the first *Levin* factor, no suspect classification or fundamental right is implicated. Like the

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[7] Citing *Ohio Bureau of Emp't Servs. v. Hodory*, 431 U.S. 471, 480 (1977), amicus COST suggests the Department has waived its argument under the comity doctrine. Unlike the State of Ohio in *Hodory*, however, the Department here is the respondent and the prevailing party below. It thus may defend the lower court's judgment on any ground which the law and record permits. *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 166 n.8 (1977).

Levin plaintiffs, the DMA asserts violations of the Commerce Clause. 560 U.S. at 430-31. But those assertions, as the *Levin* Court held, are insufficient to overcome the "demand[ed] deference" owed to the state courts. *Id.* at 432.

As to the second *Levin* factor, the DMA through its requested relief – permanent enjoinment of Colorado's law – seeks to maintain its members' perceived competitive advantage over Colorado's brick-and-mortar retailers. As the DMA acknowledges, its remote members are not required to collect Colorado use tax on retail sales to Colorado consumers at the point of sale. Pet. for Writ of Cert. at 4 (citing *Quill Corp.*, 504 U.S. 298). And because "[m]ost Colorado residents do not report or remit use tax despite the legal obligation to do so," the DMA's members enjoy a perceived price advantage over their brick-and-mortar counterparts within Colorado who are required to collect and remit. App. at A-5. That perceived price advantage amounted to an astounding $172.7 million in 2012 in Colorado alone. *Id.* Accordingly, the DMA is "seeking federal-court aid in an endeavor to improve [its members'] competitive position." *Levin*, 560 U.S. at 431.

The final *Levin* factor – the state court's relative flexibility in correcting any violation – also supports the Tenth Circuit's decision. Contrary to the DMA's assertion, wholesale invalidation of Colorado's entire notice and reporting scheme is not the *only* possible remedy in the event a constitutional infirmity is proven by the DMA. Colorado's state courts, unconstrained in their remedial options by the TIA, may sever any discrete portion of Colorado's law that is held constitutionally infirm. *See, e.g., Bd. of County Comm'rs v. Vail Assocs., Inc.*, 19 P.3d 1263, 1280 (Colo. 2001). It remains to be seen whether the DMA will carry its burden in demonstrating unconstitutionality as to the entire statutory scheme, a single discrete subpart, or none at all. In any event, being "more familiar with state legislative preferences," *Levin*, 560 U.S. at 431-32, Colorado's state courts may attempt "to implement what the legislature would have willed had it been apprised of the constitutional infirmity."[8] *Id.* at 415.

Beyond these three *Levin* factors, other "'special reasons'" rooted in comity justify the policy of federal noninterference. *Levin*, 560 U.S. at 422 n.2 (quoting *Perez v. Ledesma*, 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part)). Justice Brennan more than 40 years ago cautioned that concern for state solvency and orderly tax administration counsel in favor of state courts exercising jurisdiction in the first instance:

> The procedures for mass assessment and collection of state taxes and for administration

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[8] Although currently impossible to predict with certainty because the DMA has yet to prove *any* constitutional infirmity, an example of a remedial option available to the Colorado state court may include the severing of the first class U.S. mail requirement for the Annual Purchase Summary if it is found to be unduly burdensome. *See* App. at E-3.

> are generally complex, and necessarily designed to operate according to established rules. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit, the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts.

Perez, 401 U.S. at 128 n.17 (Brennan, J., concurring in part and dissenting in part).

Justice Brennan's admonition applies with particular force here. The DMA is not challenging a mere incidental licensing fee or insignificant service charge. It is challenging the enforcement mechanism that Colorado employs to enable collection of the use tax applicable to all remote transactions.

Concerns for comity are particularly acute at this stage of the case. Nearly four years after the initiation of the federal action, the parties are actively relitigating the very same Commerce Clause claims in Colorado state court. In the interests of comity and achieving finality of the litigation, this Court should deny the petition for writ of certiorari.

The Tenth Circuit's alternative holding under the doctrine of comity equally and independently supports its decision. Further review by this Court is not merited.

CONCLUSION

Given the lack of development of the TIA and comity issues in the courts below and the ongoing state court adjudication of the DMA's challenge, this case presents a poor vehicle to reexamine the proper scope of the TIA and comity. The Tenth Circuit's decision is consistent with this Court's precedent and no split of authority exists amongst the circuits that merits this Court's review. The DMA's petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY
BRIEF

No. 13-1032

IN THE
Supreme Court of the United States

DIRECT MARKETING ASSOCIATION,
Petitioner,

v.

BARBARA BROHL,
IN HER CAPACITY AS EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the Tenth Circuit Court of Appeals

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CORPORATE DISCLOSURE STATEMENT

The Direct Marketing Association's Rule 29.6 Statement was set forth at p. iii of the petition for a writ of certiorari, and there are no amendments to that statement.

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The Tenth Circuit's ruling below is at odds both with the intent of Congress in enacting the Tax Injunction Act, 28 U.S.C. § 1341 ("TIA"), and with the decisions of at least two other circuits interpreting and applying its jurisdictional bar. Those conflicting circuit court decisions are not "outdated," as the Respondent contends, and have not been overruled or superseded, but rather have continuing vitality with regard to the exercise of federal court jurisdiction over state regulatory requirements that are, at most, indirect measures for promoting compliance with state tax laws. Nor is the doctrine of comity applicable in this case to eliminate the need for further review by the Court.

ARGUMENT

I. THERE IS A SPLIT AMONG THE CIRCUITS REGARDING THE APPLICATION OF THE TAX INJUNCTION ACT TO SECONDARY ASPECTS OF STATE TAX ADMINISTRATION.

In the proceedings below, neither the parties, nor the District Court perceived the TIA to bar the lower court's exercise of jurisdiction over DMA's constitutional challenge to Colo. Rev. Stat. §§ 39–21–112(3.5)(c) & (d) ("the Colorado Act") and 1 Colo. Code Regs. §§ 201–1:39–21–112.3.5(2), (3), & (4) ("the Regulations").[1] The Tenth Circuit Court of Appeals, however, construed the reach of the TIA differently, disregarding the teachings of this Court's definitive ruling on the purpose and scope of the TIA in *Hibbs v. Winn*, 542 U.S. 88 (2004) and adopting an approach in acknowledged conflict with the First Circuit's decision in *United Parcel Service, Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003) ("UPS"). The Tenth Circuit's ruling is also demonstrably at odds with the Second Circuit's authoritative decision in *Wells v. Malloy*, 510 F.2d 74 (2nd Cir. 1975). *See generally* App. A-1 – A-33. (Tenth Circuit ruling).

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[1] The Respondent's explanation that she elected not to raise the TIA before the District Court in order to seek an expedited ruling on the constitutionality of the law is a curious, after-the-fact justification of her failure to assert the TIA in the lower court. *See* Respondent's Brief in Opposition ("Opp.") at 5–6 n.1. On its face, this explanation would suggest that the Respondent,

The Respondent asserts, however, that there is no conflict among the Circuit Courts of Appeals because *UPS* and *Wells* are purportedly "outdated" authorities on which the DMA relies solely to manufacture an apparent split among the circuits. Opp. at 9, 16. In arguing that the Court should therefore decline to issue a writ of certiorari, the Respondent fails to acknowledge the Tenth Circuit's own treatment of *UPS* and *Wells*. Moreover, the Respondent's contention that *UPS* and *Wells* have been superseded by later cases is contradicted by numerous decisions—including, with regard to *Wells*, this Court's opinion in *Hibbs*—which demonstrate that *UPS* and *Wells*

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aware of what she believed to be a fundamental limitation on the District Court's jurisdiction, nevertheless chose not to bring the matter before the court for decision, and instead sought a ruling from a court that she believed had no jurisdiction to act. Notwithstanding the Respondent's newly-presented explanation for her failure to seek dismissal on TIA grounds below, the Respondent's actions in the lower courts demonstrate that, like the DMA and the District Court, the Respondent simply did not perceive the TIA to be a bar against the exercise of federal court jurisdiction in this case, prior to the entry of the Tenth Circuit's decision.

each remain controlling authority in their respective circuits regarding the proper application of the TIA as it applies to secondary aspects of state tax administration.

A. The Tenth Circuit Declined To Follow The First Circuit's Decision In *UPS* Precisely Because *UPS* Conflicts With Tenth Circuit Authority.

Although the Respondent asserts that there is no conflict between the decision below and the First Circuit's decision in *UPS*, the Tenth Circuit in its ruling expressly disagreed with the reasoning of *UPS* and declined to follow it. App. at A-22. The circuit conflict is manifest, as even the Tenth Circuit acknowledges.

UPS concerned a challenge by a non-taxpayer (the common carrier UPS) to a notice and reporting regime similar in many respects to the Colorado Act. *See UPS,* 318 F.3d at 326–27 (describing reporting obligations imposed on carriers). The Puerto Rico Secretary of Treasury sought dismissal of the suit filed by UPS under the Butler Act, 48 U.S.C. § 872, the Puerto Rico analog to the TIA. *Id.* at 330. The First Circuit held that the Butler Act did not apply. *Id.* at 330–31. The Court found that in challenging the notice and reporting obligations, UPS did not contest either the validity of the underlying tax due from consumers receiving packages delivered by UPS, or the Secretary's authority to collect the tax. *Id.*

In declining to follow the *UPS* decision, despite the close similarities between it and the DMA's challenge in this case, the Tenth Circuit explained that "[m]uch of *UPS*'s reasoning *conflicts with our own binding case law.*" *Id.* (italics added). Thus, according to the Tenth Circuit, and contrary to the Respondent's contention, the decision below not only conflicts with *UPS*, it serves to reinforce a deep and demonstrable split in authority between the Tenth Circuit's understanding of the TIA and the First Circuit's interpretation of the proper exercise of jurisdiction under a parallel federal statute restricting jurisdiction in tax cases.

The Respondent further asserts that *UPS* is not at odds with the Tenth Circuit's ruling in this case because *UPS* has supposedly been "superseded" by subsequent decisions of the First Circuit. Opp. at 18. No First Circuit case, however, including none of those cited by the Respondent, has overruled, abrogated, or even distinguished *UPS*. To the contrary, the later First Circuit decisions referenced by the Respondent each cited *UPS* in explaining the proper application of the TIA.

For example, in *Pleasures of San Patricio, Inc. v. Mendez-Torres*, 596 F.3d 1 (1st Cir. 2010) the First Circuit relies upon *UPS* for the proposition that "[n]ot every statutory or regulatory obligation that may aid the Secretary [of the Treasury]'s ability to collect a tax is immune from attack in federal court by virtue of the Butler Act's jurisdictional bar." 596 F.3d at 5–6 (quoting *UPS* 318 F.3d at 331). The Court next reproduces a passage from *UPS* that in turn quotes the Second Circuit's opinion in *Wells v. Malloy*, discussed *infra*, for the proposition that federal court jurisdiction is not foreclosed by the TIA in suits challenging state regulations that are only indirectly related to the payment of state taxes. *See id.* (quoting *Wells*, 510 F.2d at 77).

Likewise, in *Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3 (1st Cir. 2009), *abrogated in part by Levin v. Commerce Energy*, 560 U.S. 413 (2010), the First Circuit cited *UPS* and made no reference to limiting or superseding it. 562 F.3d at 13. Moreover, the *Coors* Court held that the TIA did not apply in that case based on *Hibbs* finding that the TIA applies "only in cases Congress wrote the Act to address, i.e., cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes." *Id.* at 14. Therefore, nothing in either *San Patricio* or *Coors*, or any other First Circuit decision, suggests that *UPS* is no longer good law.

B. The Second Circuit's Decision In *Wells* Is Not Outdated, Although It Is Fundamentally At Odds With The Decision Below.

The Respondent likewise fails to explain away the conflict between the Tenth Circuit's decision below and the Second Circuit's ruling in *Wells v. Malloy*. Emphasizing that *Wells* was decided in 1975, the Respondent asserts that other courts have criticized *Wells* as "outdated." Opp. at 18. As support for this assertion, the Respondent cites a Third Circuit decision from 1982. *Id.* (*citing Sipe v. Ameranda Hess Corp.*, 689 F.2d 396, 403 (3d Cir. 1982)).

The Respondent, however, fails to explain that both this Court in *Hibbs*, 542 U.S. at 109, and the Second Circuit in its more recent ruling in *Luessenhop v. Clinton County, N.Y.*, 466 F.3d 259, 268 (2nd Cir. 2006), cite *Wells* as an authoritative source regarding proper interpretation of the TIA. Indeed, as the Second Circuit noted in *Luessenhop*, Judge Friendly in *Wells* examined the same legislative history that this Court later reviewed in *Hibbs*, and reached a similar conclusion regarding its meaning, *i.e.*, that Congress' central purpose in enacting the TIA was to restrict jurisdiction over suits brought by taxpayers challenging their liability for state taxes. *Luessenhop*, 466 F.3d at 265.[2]

In *Luessenhop*, the Second Circuit relied on both *Wells* and *Hibbs* to guide its understanding of the language and purpose of the TIA. *Luessenhop*, 466 F.3d at 264–66. The Court noted that *Wells* found "persuasive evidence" in the Act's legislative history that Congress sought to limit jurisdiction over suits by taxpayers "going to the validity of the particular taxes imposed upon [them]." *Id.* at 266 (citing *Wells,* 510 F.2d at 77) (brackets added). *Hibbs*, it found, reached a similar conclusion. *Id.* Although the suit before the Court in *Luessenhop* was not directly analogous to *Wells* on its facts, the Second Circuit nonetheless found *Wells* to be instructive on the purpose and scope of the TIA. *Id.* at 268.

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[2] The Respondent, in arguing that the Tenth Circuit's decision below is consistent with *Hibbs* and with prevailing authority from other circuits, fails to discuss this Court's comprehensive review of legislative history of the TIA in *Hibbs*. The Court's definitive ruling in *Hibbs* concerning the intent of the TIA, largely disregarded by both the Respondent and the Tenth Circuit, remains the proper foundation for lower court decisions regarding the scope of the Act. *See, e.g., Laborde v. City of Gahanna,* -- Fed.Appx. --, 2014 WL 1282546, at*3 (6th Cir. Apr.1, 2014) ("The TIA does not bar all federal court challenges to state and local tax policies, but only those in which the taxpayer seeks to avoid a tax obligation") (citing *Hibbs*, 542 U.S. at 99–100).

Other courts also continue to cite *Wells* as an authoritative source regarding the proper interpretation of the TIA, including with regard to the appropriate limits on the scope of the Act's jurisdictional bar. *See, e.g., Berjikian v. Franchise Tax Bd.*, 2014 WL 690211, at * 2 (C.D. Cal. Feb. 20, 2014) (the TIA does not bar suit brought by taxpayer who does not challenge the validity of the tax imposed but challenges the sanction of state license revocation for non-payment of the tax); *Pickell v. Sands*, 2012 WL 6047286, at *5–6 (E.D. Cal. Dec. 5, 2012) (same); *Four K. Group, Inc. v. NYCTL 2008-A Trust*, 2013 WL 1562227, at *5 (E.D.N.Y. Apr. 15, 2013) ("[In enacting the TIA], Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law going to the validity of particular taxes imposed upon them.") (quoting *Wells*, 510 F.2d at 77) (brackets in original).

Not even the Tenth Circuit itself, in its decision below, agrees with the Respondent's contention that *Wells* is outdated. To the contrary, the Tenth Circuit purports to endorse *Wells*' conclusion that the TIA does not bar "any action challenging a state law that could possibly secure tax payment." *See* App. at A-23. The Court then seeks to distinguish *Wells*, but as the DMA demonstrated in its petition, the Tenth Circuit's decision is at odds with the reasoning of *Wells*. *See* Pet. at 21–22.

In sum, the Respondent's assertion that *Wells* is not in conflict with the Tenth Circuit's ruling because it is "outdated" and no longer properly represents controlling Second Circuit authority is incorrect.[3]

II. THE COMITY FACTORS OF *LEVIN V. COMMERCE ENERGY* ARE NOT PRESENT IN THIS CASE.

The Respondent also urges the Court to deny the DMA's petition based on the doctrine of comity, as recently discussed by the Court in *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010). As demonstrated by the DMA in its petition (at 24–27), however, the principles of comity do not foreclose federal court jurisdiction over the DMA's claims. The Respondent's counter-arguments fail to demonstrate that comity applies.

In order for comity to dictate dismissal of the DMA's suit, no single *Levin* factor alone is sufficient; rather, it is the "confluence" of all the factors, taken together, that "demand[s] deference to the state adjudicative process." *Levin*, 560 U.S. at 431–32 (brackets added). Of "key importance" is the third factor, *i.e.*, whether the claims in question afford alternative forms of possible relief by a reviewing court. *Id.* at 426–28. The Respondent argues that there are multiple possible remedies because a Colorado state court could "sever any discrete portion of Colorado's law that is held constitutionally infirm." Opp. at 24–25.

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[3] The Respondent's citation to other circuit court rulings that it contends are consistent with the Tenth Circuit's decision below, *see* Opp. at 20–22, even assuming they are on point, serves only to highlight the existence of a conflict among the circuits. *See also I.L. v. Alabama*, 739 F.3d 1273, 1283 (11th Cir. 2014) (noting that the scope of the TIA remains "somewhat unsettled" even after *Hibbs*). To the extent that there are other courts that share the Tenth Circuit's view, and conflict with prevailing authority in the First and Second Circuits, the need for this Court to clarify the proper application of the TIA to suits challenging secondary aspects of state tax administration that neither impose a tax, nor require the collection of a tax, is that much more acute.

Severance, however, is not an option unique to state courts, but is equally an approach that a federal court would have an obligation to examine, if it concluded that only a portion of the notice and reporting obligations of the Colorado Act was unconstitutional. *See Ayotte v. Planned Parenthood of New England*, 546 U.S. 320, 330–31 (2006) (in finding that a portion of a state law is unconstitutional, court must ask whether severance is appropriate). In any event, the Respondent's severance argument fails to address the fundamental point made by the DMA that if any of the notice and reporting requirements is held to be unconstitutional, they must be suspended. *See* Pet. at 25–26. Since the third, and most important, *Levin* factor is absent, comity does not apply.

The Respondent's arguments regarding the other two *Levin* factors are equally unavailing. Respondent claims, with regard to the second factor, that the DMA's suit seeks to enlist "federal-court aid in an endeavor to improve [its members'] competitive position." Opp. at 24 (citing *Levin*, 560 U.S. at 431). To the contrary, the DMA seeks the assistance of the federal court to prevent the State of Colorado from imposing unconstitutional regulatory requirements upon its affected members, not to shield them from competition from retailers that collect Colorado sales tax (a category which includes both in-state retailers and those remote sellers that are required or elect to collect Colorado sales tax).

Finally, the Respondent claims that deference to the state courts is due because the DMA's suit concerns commercial matters, as to which the state has wide latitude, and not any fundamental right. Opp. at 23–24. The Court in *Levin*, however, noted that retention of federal court jurisdiction is appropriate in cases involving "economic rights that employ classifications subject to heightened scrutiny *or* impinge on fundamental rights." 560 U.S. at 426 (italics added). The Colorado Act, on its face, imposes different obligations on out-of-state retailers than it imposes on in-state, Colorado retailers, thus triggering "strict scrutiny" under established Commerce Clause jurisprudence. *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 99 (1994) (facially discriminatory laws are subject to scrutiny so stringent that facial discrimination may itself be a "fatal defect").[4] Federal courts need not give deference to state courts when reviewing state laws that discriminate against interstate commerce on their face. For all these reasons, the doctrine of comity is not applicable in this case.

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[4] It is also worth noting that the DMA's Complaint alleged causes of action under multiple constitutional provisions, including violation of the First Amendment's right to freedom of speech, although the parties agreed to litigate the DMA's Commerce Clause claims to their conclusion before addressing other claims. *See* C.A. Appx. 46-82 (Amended Complaint), 1677–79 (parties agreement to proceed to judgment on Commerce Clause claims). Thus, the DMA's complaint against the Colorado Act did include allegations that the fundamental rights of both its members and their customers were violated by the Act.

IV. THE PROCEDURAL HISTORY AND POSTURE OF THIS CASE EMPHASIZE THE NEED FOR THE COURT TO ACCEPT REVIEW.

Finally, the Respondent suggests that the Court should decline review because the parties are now litigating the Commerce Clause claims before a state court in Colorado, which has preliminarily enjoined enforcement of the Colorado Act. Opp. at 7–8, 26. Rather than counselling non-involvement by the Court, the continuing proceedings in state court only emphasize the need for the Court to provide further guidance regarding federal court jurisdiction over claims, such as the DMA's, challenging secondary aspects of state tax administration. Although neither party, nor the federal District Court, perceived the TIA as imposing a jurisdictional barrier, both the parties and the courts have now invested substantial and duplicative resources for over three years without reaching a definitive ruling on the important constitutional questions at the heart of the case. Issuance of a writ of certiorari will allow the Court to provide increased clarity regarding the proper application on the TIA in future suits so that jurisdictional uncertainties do not unduly interfere with reaching a prompt and efficient resolution on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 17, 2014

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AMICUS
CURIAE
BRIEF

No. 13-1032

IN THE

Supreme Court of the United States

DIRECT MARKETING ASSOCIATION,
Petitioner,
v.

BARBARA BROHL,
IN HER CAPACITY AS EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Council On State Taxation ("COST") is a non-profit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. COST represents over 600 multistate businesses in the United States, including companies in numerous industries. As *amicus*, COST has participated in many of the significant tax cases to come before this Court in recent years, including: *Levin v. Commerce Energy*, 560 U.S. 413 (2010), *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1 (2009), *MeadWestvaco Corp. v. Illinois Department of Revenue*, 553 U.S. 16 (2008), and *CSX Transportation, Inc. v. Georgia State Board of Equalization*, 552 U.S. 9 (2007).

COST's membership has a vital interest in ensuring that states do not impede the rights of all businesses to engage in commerce in the national market. To that end, it is important to COST members that the federal courts remain available to resolve constitutional challenges to state laws. The federal Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, should not impede a person or business from resolving an issue before a federal district court when a state's taxing authority is not being challenged. Access to the federal courts protects out-of-state businesses from parochial favoritism. Statutes or regulations imposed by the state that only have a remote connection with state taxes should not be subject to the TIA, or the doctrine of comity.[1]

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of *amicus's* intent to file

STATEMENT OF THE CASE

In February 2010, the Colorado legislature enacted notice and reporting obligations on remote sellers who are not collecting Colorado's sales or use tax, *see* Colo. Rev. Stat. § 39-21-112(3.5)(c) & (d). The Colorado Department of Revenue ("CDOR") promulgated a regulation in June 2010 to fill in some gaps in the law, *see* Colo. Code Regs. § 201-1:39-21-112.3.5 (2010). The law and the regulation require sellers not collecting and remitting Colorado's sales tax or use tax to: (1) provide a notice to the purchaser at the time of sale that the seller does not collect Colorado's tax and that the purchase is not exempt merely because it is purchased over the Internet or by other remote means (including a prohibition of the seller implying no tax is due); (2) annually send to purchasers, via first class mail, detailed information on their purchases shipped to a location in Colorado; and (3) annually provide the CDOR with a seller's report that lists the name of the purchasers having goods shipped into the State along with those purchasers' billing addresses, shipping addresses, and the total amount sold to each purchaser. Finally, substantial penalties are imposed on remote sellers who fail to comply with the notice and reporting rules. § 201-1:39-21-112.3.5-3-a(iv) (2010).

The Petitioner, Direct Marketing Association ("DMA"), a trade organization supporting remote sellers with a multitude of marketing channels (*e.g.*, catalog, advertisements, and the Internet), filed suit against Colorado's law and regulation in June 2010 in the U.S. District Court for the District of Colorado

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this brief. Written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

(District Court). The thrust of the DMA's complaint was that Colorado's law and regulation violated the Commerce Clause. In January 2011, the District Court granted a preliminary injunction, enjoining the CDOR from enforcing the law and regulation, made permanent in the District Court's March 30, 2012 decision. *Direct Marketing Association v. Huber*, Civil No. 10-cv-015460-REB-CBS, 2012 WL 1079175 (D. Colo. Mar. 30, 2012) (hereinafter "D. Colo. Op.").

The CDOR subsequently appealed that decision to the United States Court of Appeals, Tenth Circuit ("Tenth Circuit"). While DMA and the CDOR never raised the TIA to have the case dismissed on jurisdictional grounds before the District Court or the Tenth Circuit, on August 23, 2013 the Tenth Circuit held the TIA divested the District Court of its jurisdiction and remanded the case back to the District Court to dismiss the case for lack of jurisdiction. *Direct Marketing Ass'n v. Brohl*, 735 F.3d 904 (10th Cir. 2013) (hereinafter "10th Cir. Op."). DMA filed a request for rehearing *en banc*, but was denied on October 1, 2013. Proceeding back to state court, the DMA filed a request on November 5, 2013 to again enjoin Colorado's law and regulations from enforcement. On February 18, 2014, a state district court granted DMA's request for a preliminary injunction, again enjoining CDOR's enforcement based on the law being facially discriminatory against interstate commerce. The state district court held that the law and regulation only fell on sellers located outside of Colorado. *Direct Marketing Ass'n v. Colorado Dep't of Revenue*, No. 13CV34855 (D. Colo. Feb. 18, 2014).

SUMMARY OF THE ARGUMENT

This case provides the Court with an opportunity to clarify the limits of the TIA's jurisdictional bar to lawsuits in federal court challenging state tax administration rather than state tax collection.

The sole issue in determining the applicability of the TIA is whether the petitioner's challenge to novel, burdensome and arguably discriminatory information reporting rules that do not themselves impose a tax or the obligation to collect a tax can somehow be construed as "restrain[ing] the... collection of any tax." 28 U.S.C. §1341.

The Tenth Circuit, in an unprecedented, broad ruling, held that the TIA barred the petitioner from access to the District Court because the law in question could, somehow speculatively, indirectly, and/or tangentially affect the collection of state taxes. In so holding, the Tenth Circuit placed itself in direct conflict with long-standing Court of Appeals decisions in at least three other Circuits that took a much narrower view of the jurisdictional bar created by the TIA: the First Circuit in *United Parcel Service, Inc. v. Flores-Galarza,* 318 F. 3d 323 (1st Cir. 2003); the Second Circuit in *Wells v. Malloy*, 510 F. 2d 74 (2nd Cir. 1975); and the Sixth Circuit in *BellSouth Telecommunications, Inc. v. Farris*, 542 F.3d 499 (6th Cir. 2008).

Apart from the direct conflict with the other Circuits, the chief problem with the Tenth Circuit's opinion is that it presents no workable standard. According to the Tenth Circuit, any state action that somehow affects state revenue, no matter how tangential and no matter how much it stretches the imagination, invokes the bar to federal court jurisdiction. This cannot be so. As the Ninth Circuit has observed, "Congress did not intend to remove federal court jurisdiction whenever some state revenue might be affected somehow." *Hexom v.*

Oregon Dep't of Tax., 177 F.3d 1134, 1136 (9th Cir. 1999).

The principles of comity, as espoused by this Court in *Levin*, do not apply here. The comity doctrine in the tax context stems from the deference shown to states in matters of tax policy. *Levin*, 560 U.S. at 414 ("[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification" (*quoting Madden v. Kentucky*, 309 U.S. 83, 88 (1940))). Such deference is not warranted here because the concern before the federal courts is not the propriety or policy behind Colorado's use tax but rather Colorado's unconstitutional requirement to force out-of-state sellers to submit to Colorado's informational reporting requirements. Moreover, this case does not implicate the concern that federal jurisdiction in a state tax case would cause potential for disruption with the operations of the state by impeding the administration of state taxation. *See id.* at 417 (the "comity doctrine ... restrains federal courts from entertaining claims for relief that risk disrupting state tax administration").

The lack of connection between the petitioner's lawsuit and the "collection" of any tax obviates the application of the comity doctrine. There is no dispute in this case—or challenge to—the tax owed. All parties agree that a "use tax" is owed by the purchaser on purchases made by Colorado residents from remote sellers (at least to the extent the items are part of the taxable sales and use tax base in the State). Nor is there any contention about the remote sellers' obligation to collect the "use tax"—they have none—as long as they lack a "physical presence" within Colorado. The remedy here would not require the State to make any change to its collection and remittance laws relating to sales and use tax; it would only remove the constitutionally impermissible notice and reporting requirements on remote sellers. Finally, and most importantly, even if the principles of comity were applicable, comity does not apply here because it was never raised below, and, as such, the point has been waived.

There is a compelling need for this Court to clear up the confusion created by conflicting decisions in the federal Circuit Courts and spell out the limits of the TIA's jurisdictional bar regarding suits that do not directly challenge state tax collections. In other words, *amicus* is very concerned that this case could have a chilling effect on individuals and businesses trying to have their other non-tax cases reviewed by a federal court, despite some abstract connection to a state's tax scheme.

The certainty and predictability that are the cornerstones of fair and efficient state tax administration require resolution of this important question on the relative availability of federal and state courts to adjudicate constitutional challenges to rules related to state tax administration. This warrants this Court's review of the Tenth Circuit's decision.

REASONS FOR GRANTING THE PETITION

I. THIS COURT NEEDS TO RESOLVE A CONFLICT BETWEEN FEDERAL CIRCUIT COURTS ON THE APPROPRIATE SCOPE OF THE TAX INJUNCTION ACT.

Amicus believes the Court should grant review of this case to clarify the appropriate scope of federal court jurisdiction under the TIA in lawsuits relating to state tax administration and not to the collection of state taxes. The current division among federal circuit courts on this topic is sowing confusion among both the states and taxpayers about the intent and reach of the TIA that can only be resolved by this Court.

The Tenth Circuit's decision held that the TIA bars federal court jurisdiction over a lawsuit to enjoin informational notice and reporting requirements of a state law that neither imposes a tax nor requires the collection of a tax. This decision is in conflict with long-standing Court of Appeals decisions in other Circuits that take a narrower view of the jurisdictional bar created by the TIA: the First Circuit in *United Parcel Service, Inc. v. Flores-Galarza*, 318 F. 3d 323 (1st Cir. 2003); the Second Circuit in *Wells v. Malloy*, 510 F.2d 74 (2nd Cir. 1975), and the Sixth Circuit in *BellSouth Telecommunications, Inc. v. Farris*, 542 F.3d 499 (6th Cir. 2008). A review of the facts and legal issues in these three cases illuminates the great divide between the decisions in the First, Second, and Sixth Circuits and the decision of the Tenth Circuit in this case.

In the *UPS* case, the First Circuit ruled that the Butler Act, the Puerto Rico law analogous to the federal TIA, did not bar federal court jurisdiction over a challenge to a tax administration statute that imposed burdensome regulatory requirements on third parties. *UPS* at 330-32. The *UPS* case involved a Puerto Rico excise tax on items that were imported into Puerto Rico. *Id.* at 326. While the incidence of the excise tax in Puerto Rico fell on the recipients/consumers of the imported goods—as does the "use" tax in Colorado—the Commonwealth's statutory scheme prohibited interstate carriers from making deliveries into Puerto Rico unless the carrier: (1) obtained up front proof of the recipient's payment of the territorial excise tax or (2) complied with complex rules that called for a prepayment of the tax along with providing the government extensive daily documentation on shipments. *Id.* at 325.

The similarities between the *UPS* case and the *DMA* case are striking. In both situations, the government endeavored to enhance the collection of taxes by imposing significant regulatory burdens on third parties that all sides agreed did not owe the tax at issue. In both cases, the third parties did not contest the underlying tax liability of the consumers or the authority of the government to collect it. Rather, the third parties protested that the territorial and state tax schemes that imposed on them significant regulatory burdens and the threat of sanctions/penalties violated federal statutory and constitutional law.

However, unlike the Tenth Circuit in *DMA*, the First Circuit in *UPS* held that not all State measures to collect a tax, however tangential, were immune from federal jurisdiction. *Id.* at 331. In holding that the Butler Act did not bar federal jurisdiction over UPS's constitutional challenge to Puerto Rico's statutory scheme, the First Circuit stated, "Not every statutory or regulatory obligation that may aid the Secretary's ability to collect a tax is immune from attack in federal court by virtue of the Butler Act's jurisdictional bar Such an interpretation extends the concept of tax collection and therefore the breadth of the Butler Act, too far." *Id.*

In the *Wells* case, the Second Circuit similarly held that the TIA did not bar federal court jurisdiction over a taxpayer challenge to a law with no direct impact on a state's tax collection efforts, but rather an indirect deployment of its coercive powers to achieve its goals. *Wells*, 510 F.2d at 77.

The *Wells* case involved a challenge to a Vermont statute that allowed the suspension of a person's driver's license for failure to pay the excise tax on his vehicle. *Id.* In that case, the plaintiff did not dispute that he owed the tax, but rather argued that the State's coercive method of penalizing someone who failed to pay the tax violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 76.

The *Wells* case, unlike the *UPS* case and the instant case, did not involve regulatory requirements placed on a third party. In *Wells*, the federal lawsuit challenged the penalty imposed on the taxpayer for non-compliance. However, it did share in common with the First and Tenth Circuit cases a challenge to a state law that was entirely tangential to the traditional mechanisms for collection of a state tax.

Unlike the Tenth Circuit decision in this case, the Second Circuit in *Wells* drew a distinction between lawsuits in which a taxpayer sought directly to "restrain" the collection of a tax, and those where the taxpayer challenged some other aspect of state tax administration. *Id.* at 77. The Second Circuit held that the focus of the TIA was on barring lawsuits in federal court that directly interfered with the collection of state monies, "...rather than indirectly through a more general use of coercive power. Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law going to the validity of the particular taxes imposed upon them ." *Id.*

In *BellSouth*, the Sixth Circuit held that the TIA did not bar a lawsuit by telecommunications providers challenging Kentucky's statute that prohibited the providers from separately stating a gross receipts tax on invoices provided to their customers. *Bellsouth*, 542

F.3d at 501-04. The providers did not challenge the gross receipts tax; rather, they challenged the State's authority to prohibit the providers from informing their customers that their bills were going up to reflect the new tax. *Id.* at 500.

The Sixth Circuit listed several reasons why the TIA did not apply, including the following pertinent to the present case: 1) the taxpayers were not trying to avoid paying the tax and 2) the relief sought "would not interfere with the relationship between the body that imposed the tax (the Commonwealth) and the bodies that owe the tax (the providers)." *Id.* at 502. The court rejected the argument by the State that the providers sought to interfere with the collection of taxes: "A ban on enjoining a *State's* tax-collection efforts do not apply." *Id.* (Italics in original). Thus, in *BellSouth* the Sixth Circuit followed the lead of the First and Second Circuits in distinguishing the application of the TIA to a tax agency's administrative functions versus a tax agency's tax collection functions.

To settle this conflict between the Tenth Circuit and the First, Second, and Sixth Circuit Courts, this Court needs to review this case.

II. THE FEDERAL TAX INJUNCTION ACT AND THE COMITY DOCTRINE ARE NOT RELEVANT IN THIS CASE.

The TIA should not apply in this case because its bar to federal jurisdiction is limited to taxpayer lawsuits to restrain "the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state." 28 U.S.C. § 1341, *see Levin*, 560 U.S. 413, 417 (2010). As noted by this Court in *Hibbs v. Winn*, 542 U.S. 88

(2004), in passing the TIA "Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority. Nowhere does the legislative history announce a sweeping congressional direction to prevent federal-court interference with all aspects of state tax administration." *Id.* at 105 (internal quotations omitted).

In this case, the DMA does not seek to restrain Colorado from collecting tax from any remote seller that may have a collection responsibility (*e.g.*, those with nexus with the state). Nor does the DMA seek any tax relief, or tangentially challenge another person's exemption from Colorado's sales/use tax. Rather, the DMA seeks relief only from the regulatory powers the Colorado Legislature granted the CDOR to impose onerous notification and reporting requirements on remote sellers that have no tax liability or collection responsibility in Colorado. Colorado's regulatory scheme violates the Commerce Clause.[2]

If the DMA were challenging Colorado's imposition of its sales/use tax, *amicus* agrees that the TIA would serve as a jurisdictional barrier and it would have been appropriate for the Tenth Circuit to dismiss this case. That is clearly not the case; the DMA only asserts that Colorado's notice and reporting regulation imposed on remote sellers violates the Commerce Clause. Colorado's sales/use tax system on remote sellers remains intact regardless of whether a federal court strikes down Colorado's notice and reporting regulation.

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[2] Besides the Commerce Clause, DMA also asserted Colorado's regulation violated the First Amendment, the right of privacy of Colorado consumers, and the Takings Clause. Pet. for Writ. Of Cert. and App. 6. *Amicus's* focus in this brief is on the Commerce Clause. This case is really not distinguishable from this Court's other Commerce Clause cases bearing on state regulatory requirements that unconstitutionally obligate out-of-state persons to report commercial activities in the manner dictated by the offending state. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977).

That leaves open the question of whether the comity doctrine applies in this case after this Court's clarification of it in *Levin*. There was some confusion after this Court's decision in *Hibbs v. Winn,* 542 U.S. 88 (2004), on whether *Hibbs* nullified the comity doctrine. This confusion was based on the Court allowing third parties in *Hibbs* to pursue a constitutional challenge under the Establishment Clause in a federal forum. In *Hibbs*, an Arizona citizen challenged a tax credit Arizona provided to its taxpayers. *Levin* at 425.

It is important to reiterate that the State of Colorado, specifically the CDOR, did not move for this case to be dismissed based on the TIA or the comity doctrine. The comity doctrine is the exercise of restraint "to abstain from deciding the remedial effects of [the state tax measure] holding." *Levin* at 427-28, *citing American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 176 (1990). It can, however, be waived.

This Court has previously held that a state can waive the application of the comity doctrine. *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977). Addressing an unemployment compensation benefit conflict dispute, this Court held, "If a State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system." *Id.* at 480. This Court in *Levin* recently cited this as being a "prudential doctrine." *Levin* at 432. Unlike the *Levin* case, where the State of Ohio never waived its demand for the case to remain under the State's jurisdiction, the CDOR here proffered no resistance and acquiesced to the jurisdiction of the federal courts. D. Colo. Op. at 2 ("I have jurisdiction over this case under 28 U.S.C. §1331 (federal question) the defendant does not challenge the plaintiff's standing to present its claims under the Commerce Clause.")

This case also does not have the "remedy" issue that is frequently cited to justify the application of the comity doctrine.[3] As noted by this Court in *Levin*, one reason for restricting access to the federal courts in state cases is that the remedy a state may need to provide to correct constitutional infirmities is something that will still ultimately need to be addressed by the state. *Levin* at 431. In *Levin*, the petitioner was not asking that his own tax burden be lowered but rather that the burden of his competitors be raised. The remedy for this sort of request was naturally best left to Ohio's courts and to the Ohio Legislature under principles of comity. However, this case does not present that concern because the remedy here is within the power of the federal courts to grant without more.[4] The remedy DMA seeks will not impact the State's tax collection system, but focuses solely on its notice and reporting requirements. If the Colorado law is declared unconstitutional by a federal court, no further remedy will be required that could interfere with the CDOR's collection and enforcement mechanisms relating to the sales and use tax.

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[3] See *Levin* at 427.

[4] *See* 28 U.S.C. § 2201 (giving the federal courts the power to grant declaratory judgments to invalidate unconstitutional acts). This case is also different from *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981). In that case this Court applied the principle of the comity doctrine to prevent a 42 U.S.C § 1983 action to obtain damages for the alleged unconstitutional administration of the State of Missouri's property tax. Unlike *Fair Assessment*, the DMA is not asserting any damages against Colorado for its regulation that violates the DMA members' constitutional rights. DMA is also not asserting the state tax laws in Colorado, specifically Colorado's sales/use taxes, are

In contrast, this Court's decision in *Hibbs* had a greater potential to impact Arizona's administration of its income tax because the State would have had to provide a remedy to redress an unconstitutional tax credit that aided parochial schools. *Hibbs* at 99. That concern does not exist in this case.

This Court should grant DMA's request for review of the Tenth Circuit's decision to avoid the illogical outcome whereby an aggrieved party's access to federal district courts can be stymied simply by a state's assertion of a remote connection of the case to the state's tax collection powers.

III. ACCESS TO FEDERAL COURTS IS IMPORTANT TO INDIVIDUALS AND BUSINESSES ENGAGED IN INTERSTATE COMMERCE.

In matters of state taxation, the TIA, 28 U.S.C. § 1331, and Art. III of the U.S. Constitution proscribe federal jurisdiction in certain situations. *See* 28 U.S.C. §1341 and *Ex parte Young*, 209 U.S. 123 (1908). On the other hand, diversity jurisdiction under Article III includes controversies "between Citizens of different States" within the judicial power of the federal government. U.S. Const. art. III, §2. It was codified by the Judiciary Acts of 1789 and 1888-89,

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unconstitutional as the Petitioner was attempting to do in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943).

which provide that for any cases with a certain amount in dispute (now $75,000 under 28 U.S.C. 1331) and a federal question at issue, the federal courts should have jurisdiction. Since this case involves 1) parties outside Colorado suing a Colorado party (the State) and 2) a question regarding the constitutionality of Colorado's notice and reporting obligations of remote sellers, federal jurisdiction is appropriate.

In *Ex parte Young,* this Court upheld a contempt order against the Minnesota Attorney General for violating an injunction prohibiting him from enforcing a statute that reduced railroad rates. *Ex parte Young,* at 192-93. The Court found that his actions as a state officer were not official in character because of the unconstitutionality of the law he was trying to enforce. *Id.* at 155-57. The case provided for federal jurisdiction to plaintiffs seeking injunctive relief for the unconstitutional actions of state officials.[5] This opened the federal courts to a flood of cases. To contain the flood, Congress enacted the TIA in 1937, to limit the tax cases allowed in federal courts, barring access to federal district courts if a taxpayer sought to suspend or restrain "the assessment, levy or collection" of any *tax* if there is "a plain speedy and efficient remedy" in state courts. 28 U.S.C. §1341.[6] Absent assessment, levy or collection of taxes, the *Ex parte Young* doctrine still applies. *Amicus* argues that only the informational requirements are at issue in this case, not an assessment, levy or collection of a tax. Therefore, it was not appropriate for the Tenth Circuit to remand the case back to the federal district court for its dismissal; it should have remained in federal court.

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[5] Frederick C. Lowinger, *The Tax Injunction Act and Suits for Monetary Relief*, 46 U. CHI. L. REV. 736, 740 (1979).

[6] Subsequent to enactment of the TIA, Congress inserted exceptions to allow certain state tax issues to be litigated in the federal courts. *See e.g.,* The Railroad Revitalization and Regulatory Reform Act of 1976 (49 U.S.C. § 11501, hereafter the "4-R Act") and the Prevent Discriminatory Taxes Against Motor Carrier Transportation Property Act (49 U.S.C. § 14502). Congress has articulated that access to the federal courts was needed in these acts due to "unlawful, unreasonable and unjust

The Tenth Circuit reiterated its adherence to the *Ex parte Young* doctrine in *Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007). In *Hill v. Kemp*, motorists brought a First Amendment challenge to the state's statutory scheme for specialty license plates. *Id.* at 1236. The Tenth Circuit found that the charges for the specialty license plates were taxes under State law and thus precluded from federal jurisdiction by the TIA; however, "the [injunctive] relief sought in this case falls within the scope of *Ex parte Young*." *Id.* at 1262. Similar to the plaintiffs in *Hill v. Kemp*, who requested an injunction to stop the state tax commission from enforcing certain parts of the state's license plate scheme, DMA is requesting a permanent injunction enjoining the CDOR from enforcing Colorado's onerous notice and reporting obligations imposed on remote sellers. *See* D. Colo. Op. at 3. The DMA seeks injunctive relief from a state officer; thus the *Ex parte Young* doctrine explicitly allows federal court jurisdiction, and the Tenth Circuit provided no reasoning as to why it overturned its own precedent set only seven years ago.

The TIA and comity best serve their purposes when they close federal court doors to tax cases that bear on

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discrimination against and undue burden upon interstate commerce ..." S. Rep. No. 91-630, 91st Cong. 1st Sess. 3 (1969).

state and local issues. In cases where the controversy related to state and local tax matters can be resolved solely by reference to state law, the policy considerations for involving the federal courts are perhaps attenuated. However, this case in particular raises peculiar concerns for this Court because it involves a question of interstate commerce, a federal concern that should properly be within the orbit of federal courts. In declining to raise either the TIA or comity as a bar to jurisdiction in a non-tax case, the Fourth Circuit was alarmed by the notion of leaving matters of national importance without federal oversight:

> We cannot overlook the fact that the absence of federal jurisdiction in this case would turn what are truly interstate issues over to local authorities. Applying the Tax Injunction Act might encourage punitive financial strikes against single entities with national connections, for the federal courts would be unavailable to protect companies against local discrimination, preempted state laws, and other federal constitutional violations. The implications of allowing localities to impose financial exactions exclusively upon single entities of national reach with no accountability in federal court are profound, and we decline to foreclose these federal claims with a jurisdictional bar.

GenOn Mid-Atlantic, LLC v. Montgomery County, 650 F.3d 1021, 1026 (4th Cir. 2011).

Colorado's controversial reporting requirement here is no less a "financial strike" against out-of-state concerns than was the "tax" at issue in *GenOn*. Out-of-state companies will have to spend time and money complying with Colorado's controversial reporting requirements. *Amicus* does not believe that a federal challenge should categorically exempt a matter from the TIA but that federal challenges should enjoy heightened scrutiny in the application of the TIA.

This Court needs to provide guidance and apply a balancing approach to the denial of access to the federal courts when a case has only remote connections to a state's taxing authority, especially in cases like this one where federal interest (for which the federal courts were designed to protect) are at stake. Of note, the Tenth Circuit addressed a case in Colorado that deals with Article X, § 20 of Colorado's Constitution, the State's Taxpayer's Bill of Rights ("TABOR"). *Kerr v. Hickenlooper*, No. 12-01445, 2014 WL 889445 (10th Cir. Mar. 7, 2014). In that case, plaintiffs filed suit alleging that TABOR's revenue-raising limitations prevented the State from having a republican form of government, as required by Article IV, §4 of the Constitution of the United States. *Id.* at *2. In *Kerr*, the Tenth Circuit addressed the issue of standing, but unlike the DMA case at hand, the Tenth Circuit never sought to invoke the TIA or the comity doctrine to bar the federal district court from jurisdiction to hear the case.

To retry a case in a state court after a federal court proceeding does not promote judicial efficiency. On the other hand, to allow access to federal courts in cases involving constitutional challenges to state tax administration where there is only a remote connection to a state's tax collections, addresses the perception of unfairness many taxpayers feel over resolving issues in state courts.[7]

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[7] *See* Arthur R. Rosen & Julie M Skelton, *Desperately Seeking State Tax Fairness: The Need for Federal Adjudication*, 61

CONCLUSION

Amicus respectfully requests that this court grant DMA's petition for a *writ of certiorari*.

Respectfully submitted,

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March 31, 2014

STATE TAX NOTES 357 (Aug. 8, 2011), *available at* http://services.taxanalysts.com/taxbase/archive/stn2011.nsf/dockey/0F0DFA16E883F9C785257A0300345A96?OpenDocument&highlight=0,desperately+seeking+state+tax+fairness.

JOINT
APPENDIX

No. 13-1032

In The
Supreme Court of the United States

◆

DIRECT MARKETING ASSOCIATION,

Petitioner,

v.

BARBARA BROHL,
IN HER CAPACITY AS EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF REVENUE,

Respondent.

◆

On Writ Of Certiorari To The Tenth Circuit Court Of Appeals

◆

JOINT APPENDIX

◆

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Petition For Certiorari Filed February 25, 2014
Certiorari Granted July 1, 2014

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Order of the United States District Court for the District of Colorado Concerning Cross Motions for Summary Judgment (Mar. 30, 2012) B-1

Order of the United States District Court for the District of Colorado Granting Motion for Preliminary Injunction (Jan. 26, 2011) C-1

Order of the United States Court of Appeals for the Tenth Circuit Denying Appellee's Petition for Rehearing En Banc (Oct. 1, 2013) D-1

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (Denver)

Date Filed	No.	Docket Text
06/30/2010	1	COMPLAINT against Roxy Huber (Filing fee $350, Receipt Number 29213) Summons Issued, filed by Direct Marketing Association, The (Attachments: #1 Civil Cover Sheet, #2 Receipt) (jak) (Entered 06/30/2010)

* * *

Date Filed	No.	Docket Text
07/20/2010	7	Unopposed MOTION for Extension of Time to File Answer or Otherwise Respond re 1 Complaint and *Leave to Extend Page Limitation* by Defendant Roxy Huber. (Attachments: #1 Proposed Order (PDF Only)) (Scoville, Stephanie) (Entered: 07/20/2010)
07/20/2010	8	MEMORANDUM regarding 7 Unopposed MOTION for Extension of Time to File Answer or Otherwise Respond re 1 Complaint *and Leave to Extend Page Limitation* filed by Roxy Huber. Motions referred to Magistrate Judge Craig B. Shaffer by Judge Robert E. Blackburn on 7/20/10. TEXT ONLY ENTRY – NO DOCUMENT ATTACHED (rebsec) (Entered: 07/20/2010)

07/21/2010	9	MINUTE ORDER granting 7 Motion for Extension of Time to Answer or Otherwise Respond. Defendant has up to and including 7/30/10 to file a responsive pleading, of no more than forty pages, to Plaintiff's 1 Complaint, by Magistrate Judge Craig B. Shaffer on 7/21/10. TEXT ONLY ENTRY – NO DOCUMENT ATTACHED (cbssec) (Entered: 07/21/2010)
07/23/2010	10	FIRST AMENDED COMPLAINT against Roxy Huber, filed by Direct Marketing Association, The. (Isaacson, George) Modified on 7/26/2010 to note that the document is the First Amended Complaint (sah). (Entered: 07/23/2010)

* * *

07/30/2010	14	MOTION to Dismiss 10 Plaintiff's First amended Complaint by Defendant Roxy Huber. (Attachments: #1 Exhibit A., #2 Exhibit B) (McGovern, Karen) Modified on 8/2/2010 to create linkage (sah2). (Entered: 07/30/2010)
08/13/2010	15	MOTION for Preliminary Injunction *with Incorporated Memorandum of Law* by Plaintiff Direct Marketing Association, The. (Attachments: #1 Exhibit 1, #2 Exhibit 2) (Isaacson, George) (Entered: 08/13/2010)

03/13/2010	16	DECLARATION of *Jerry Cerasale* regarding MOTION for Preliminary Injunction *with Incorporated Memorandum of Law* 15 by Plaintiff Direct Marketing Association, The. (Isaacson, George) (Entered: 08/13/2010)
08/13/2010	17	DECLARATION of *Jeana M. Petillo* regarding MOTION for Preliminary Injunction *with Incorporated Memorandum of Law* 15 by Plaintiff Direct Marketing Association, The. (Attachments: #1 Exhibit A, #2 Exhibit B, #3 Exhibit C, #4 Exhibit D, #5 Exhibit E, #6 Exhibit F, #7 Exhibit G (Isaacson, George) (Entered: 08/13/2010)
08/23/2010	18	DECLARATION of *Kevin Lane Keller* regarding MOTION for Preliminary Injunction *with Incorporated Memorandum of Law* 15 by Plaintiff Direct Marketing Association, The. (Attachments: #1 Exhibit A) (Isaacson, George) (Entered 08/13/2010)
08/13/2010	19	DECLARATION of *Thomas J. Adler, Phd* regarding MOTION for Preliminary Injunction *with Incorporated Memorandum of Law* 15 by Plaintiff Direct Marketing Association, The. (Attachments: #1 Exhibit A, #2 Exhibit B) (Isaacson, George) (Entered: 08/13/2010)

* * *

08/27/2010	23	BRIEF in Opposition to 14 MOTION to Dismiss *Plaintiff's First Amended Complaint* filed by Plaintiff Direct Marketing Association, The. (Isaacson, George) (Entered: 08/27/2010)

* * *

09/16/2010	29	Proposed Scheduling Order *(submitted jointly by the parties)* by Plaintiff Direct Marketing Association, The. (Attachments: #1 Exhibit A., #2 Exhibit B) (Schaefer, Matthew) (Entered: 09/16/2010)
09/16/2010	30	NOTICE re 14 MOTION to Dismiss *Plaintiff's First Amended Complaint (Partial Withdrawl* [sic] *of Motion to Dismiss)* by Defendant Roxy Huber (Scoville, Stephanie) (Entered: 09/16/2010

* * *

10/01/2010	40	SCHEDULING ORDER, by Magistrate Judge Craig B. Shaffer on 10/1/2010. (klmcd) (Entered: 10/04/2010)

* * *

11/08/2010	49	ORDER. This matter is before me on the Plaintiffs Motion for a Preliminary Injunction and Incorporated Memorandum of Law 15 filed 08/13/2010. The defendants response to this motion is due to be filed on 11/19/2010, and the

		plaintiffs reply is due to be filed on 11/29/2010. On or before 12/03/2010, the parties SHALL FILE a joint status report specifying the amount of time each party estimates she or it will need to present evidence and argument at any hearing on the plaintiffs motion for preliminary injunction; by Judge Robert E. Blackburn on 11/08/2010. (sah,) (Entered: 11/08/2010)
11/19/2010	50	RESPONSE to 15 MOTION for Preliminary Injunction *with Incorporated Memorandum of Law* filed by Defendant Roxy Huber. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, Part 1, # 8 Exhibit 7, Part 2, # 9 Exhibit 7, Part 3, #10 Exhibit 7, Part 4, # 11 Exhibit 7, Part 5, # 12 Exhibit 7, Part 6, # 13 Exhibit 7, Part 7, # 14 Exhibit 8, # 15 Exhibit 9, # 16 Exhibit 10, # 17 Exhibit 11, # 18 Exhibit 12, # 19 Exhibit 13, # 20 Exhibit 14, # 21 Exhibit 15, # 22 Exhibit 16, # 23 Exhibit 17) (Scoville, Stephanie) (Entered: 11/19/2010)

* * *

11/29/2010	56	REPLY to Response to 15 MOTION for Preliminary Injunction *with Incorporated Memorandum of Law* filed by Plaintiff Direct Marketing

		Association, The. (Attachments: # 1 Affidavit Reply Exh A (Barry Decl.), # 2 Deposition Excerpts Reply Exh B (Barry Deposition), # 3 Deposition Excerpts Reply Exh C (Gable Deposition), # 4 Deposition Excerpts Reply Exh D (Keller Deposition), # 5 Affidavit Reply Exh E (Adler Decl.), # 6 Deposition Excerpts Reply Exh F (Adler Deposition), # 7 Affidavit Reply Exh G (Woock Decl.), # 8 Deposition Excerpts Reply Exh H (Fox Deposition)) (Isaacson, George) (Entered: 11/29/2010)
11/30/2010	57	REPLY to Response to 14 MOTION to Dismiss *Plaintiff's First Amended Complaint* filed by Defendant Roxy Huber. (Attachments: # 1 Exhibit Exhibit 1) (Snyder, Melanie) (Entered: 11/30/2010)
12/03/2010	58	Joint STATUS REPORT *Regarding Hearing on Motion for Preliminary Injunction* by Plaintiff Direct Marketing Association, The. (Isaacson, George) (Entered: 12/03/2010)
12/06/2010	59	ORDER. The Joint Status Report Regarding Hearing on Motion For Preliminary Injunction 58 filed 12/03/2010, is APPROVED. The stipulations stated in the joint status report concerning the composition of the record relevant to plaintiffs motion 15

		are APPROVED. The parties request for oral argument is GRANTED. The court SHALL HEAR oral argument relevant to the issues raised by and inherent to the plaintiffs motion 15 on 01/13/2011, commencing at 10:00 a.m. (MST). By Judge Robert E. Blackburn on 12/06/2010. (sah,) (Entered: 12/06/2010)

* * *

12/17/2010	65	DESIGNATION OF DEPOSITION TESTIMONY *Joint Designation of Additional Deposition Testimony Regarding Plaintiff's Motion for Preliminary Injunction* by Plaintiff Direct Marketing Association, The. (Schaefer, Matthew) (Entered: 12/17/2010)
12/17/2010	66	DESIGNATION OF DEPOSITION TESTIMONY *Excerpts from the Transcript of the Deposition of F. Curtis Barry and accompanying deposition exhibits* by Plaintiff Direct Marketing Association, The. (Attachments: # 1 Exhibit Dep. Ex. 1, # 2 Exhibit Dep. Ex. 3, # 3 Exhibit Dep. Ex. 4, # 4 Exhibit Dep. Ex. 5, #5 Exhibit Dep. Ex. 7, # 6 Exhibit Dep. Ex. 8, # 7 Exhibit Dep. Ex. 9, #8 Exhibit Dep. Ex. 10, # 9 Exhibit Dep. Ex. 11, # 10 Exhibit Dep. Ex. 12, # 11 Exhibit Dep. Ex. 13, # 12 Exhibit Dep. Ex. 15)

		(Schaefer, Matthew) (Entered: 12/17/2010)
12/17/2010	67	DESIGNATION OF DEPOSITION TESTIMONY *Excerpts from the Transcript of the Deposition of Kevin Lane Keller and accompanying deposition exhibits* by Plaintiff Direct Marketing Association, The. (Attachments: # 1 Exhibit Dep. Ex. 16, # 2 Exhibit Dep. Ex. 17, # 3 Exhibit Dep. Ex. 18, # 4 Exhibit Dep. Ex. 19, # 5 Exhibit Dep. Ex. 20, # 6 Exhibit Dep. Ex. 21, # 7 Exhibit Dep. Ex. 22, # 8 Exhibit Dep. Ex. 23, # 9 Exhibit Dep. Ex. 24, # 10 Exhibit Dep. Ex. 25, # 11 Exhibit Dep. Ex. 26, # 12 Exhibit Dep. Ex. 29, # 13 Exhibit Dep. Ex. 30, # 14 Exhibit Dep. Ex. 31, # 15 Exhibit Dep. Ex. 32, # 16 Exhibit Dep. Ex. 33, # 17 Exhibit Dep. Ex. 34, # 18 Exhibit Dep. Ex. 35, # 19 Exhibit Dep. Ex. 36, # 20 Exhibit Dep. Ex. 37, # 21 Exhibit Dep. Ex. 38) (Schaefer, Matthew) (Entered: 12/17/2010)
12/17/2010	68	DESIGNATION OF DEPOSITION TESTIMONY *Excerpts From the Transcript of the Deposition of Thomas J. Adler and accompanying deposition exhibits* by Plaintiff Direct Marketing Association, The. (Attachments: # 1 Exhibit Dep. Ex. 21, # 2 Exhibit Dep. Ex. 39, # 3

Exhibit Dep. Ex. 42, # 4 Exhibit Dep. Ex. 44, # 5 Exhibit Dep. Ex. 47, # 6 Exhibit Dep. Ex. 48, # 7 Exhibit Dep. Ex. 49, # 8 Exhibit Dep. Ex. 52, # 9 Exhibit Dep. Ex. 53, # 10 Exhibit Dep. Ex. 54, # 11 Exhibit Dep. Ex. 55, # 12 Exhibit Dep. Ex. 56, # 13 Exhibit Dep. Ex. 57, # 14 Exhibit Dep. Ex. 58, # 15 Exhibit Dep. Ex. 60, # 16 Exhibit Dep. Ex. 61, # 17 Exhibit Dep. Ex. 62, # 18 Exhibit Dep. Ex. 63, # 19 Exhibit Dep. Ex. 65, # 20 Exhibit Dep. Ex. 66, # 21 Exhibit Dep. Ex. 67, # 22 Exhibit Dep. Ex. 68, # 23 Exhibit Dep. Ex. 69, # 24 Exhibit Dep. Ex. 70, # 25 Exhibit Dep. Ex. 72, # 26 Exhibit Dep. Ex. 74, # 27 Exhibit Dep. Ex. 76, # 28 Exhibit Dep. Ex. 79, # 29 Exhibit Dep. Ex. 80, # 30 Exhibit Dep. Ex. 82, # 31 Exhibit Dep. Ex. 86, # 32 Exhibit Dep. Ex. 87, # 33 Exhibit Dep. Ex. 88, # 34 Exhibit Dep. Ex. 90, # 35 Exhibit Dep. Ex. 92, # 36 Exhibit Dep. Ex. 93) (Schaefer, Matthew) (Entered: 12/17/2010)

12/17/2010 69 DESIGNATION OF DEPOSITION TESTIMONY *Excerpts from the Transcript of the Deposition of William F. Fox and accompanying deposition exhibits* by Plaintiff Direct Marketing Association, The. (Attachments: # 1 Exhibit Dep. Ex. 95, # 2 Exhibit Dep. Ex. 96, # 3

		Exhibit Dep. Ex. 98, # 4 Exhibit Dep. Ex. 99, # 5 Exhibit Dep. Ex. 100, # 6 Exhibit Dep. Ex. 101) (Schaefer, Matthew) (Entered: 12/17/2010)
12/17/2010	70	DESIGNATION OF DEPOSITION TESTIMONY *Excerpts from the Transcript of the Deposition of Dieter G. Gable* by Plaintiff Direct Marketing Association, The. (Schaefer, Matthew) (Entered: 12/17/2010

* * *

01/13/2011	76	Minute Entry for Preliminary Injunction proceedings held before Judge Robert E. Blackburn on 1/13/2011. Taking under advisement 15 Motion for Preliminary Injunction. (Court Reporter: Suzanne Claar) (babia) (Entered: 01/13/2011)

* * *

01/26/2011	79	ORDER. Plaintiffs Motion for a Preliminary Injunction and Incorporated Memorandum of Law 15 filed 8/13/2010, is GRANTED. See order for details. By Judge Robert E. Blackburn on 1/26/2011.(sah,) (Entered: 01/26/2011)
01/26/2011	80	MINUTE ORDER setting a Telephonic Status Conference on 2/10/2011 at 10:00 a.m., in light of

		the 79 Order Granting Motion for Preliminary Injunction. *Counsel shall coordinate to create a conference call among themselves before contacting the court (303.844.2117) at the scheduled time*, by Magistrate Judge Craig B. Shaffer on 1/26/11. TEXT ONLY ENTRY – NO DOCUMENT ATTACHED (cbssec) (Entered: 01/26/2011)
01/28/2011	81	BOND *for Preliminary Injunction* posted by Plaintiff Direct Marketing Association, The. (Schaefer, Matthew) (Entered: 01/28/2011)

* * *

02/16/2011	85	Joint STATUS REPORT *and Proposed Order* by Plaintiff Direct Marketing Association, The. (Attachments: # 1 Proposed Order (PDF Only)) (Schaefer, Matthew) (Entered: 02/16/2011)

* * *

03/18/2011	91	ORDER APPROVING PROPOSED BRIEFING SCHEDULE ON COUNTS I AND II AND STAY PROCEEDINGS ON COUNTS II THROUGH VIII. By Judge Robert E. Blackburn on 3/18/2011. (sah,) (Entered: 03/18/2011)
03/21/2011	92	MINUTE ORDER. The Defendants Motion To Dismiss Plaintiffs First Amended Complaint 14 is DENIED.

		By Judge Robert E. Blackburn on 3/21/2011.(sah,) (Entered: 03/21/2011)

* * *

04/28/2011	95	ANSWER to 10 Amended Complaint *Counts I and II (Commerce Clause)* by Roxy Huber.(Wesoky, Jack) (Entered: 04/28/2011)

* * *

05/06/2011	98	MOTION for Summary Judgment *on Counts I and II* by Plaintiff Direct Marketing Association, The. (Isaacson, George) (Entered: 05/06/2011)
05/06/2011	99	MOTION for Partial Summary Judgment *Counts I and II (Commerce Clause)* by Defendant Roxy Huber. (Attachments: # 1 Exhibit 1- Fox Decl. & Rep., # 2 Exhibit 2-1 IRS Tax Gap, # 3 Exhibit 2-2 IRS Tax Gap, # 4 Exhibit 2-3 IRS Tax Gap, # 5 Exhibit 2-4 IRS Tax Gap, # 6 Exhibit 2-5 IRS Tax Gap, # 7 Exhibit 2-6 IRS Tax Gap, # 8 Exhibit 2-7 IRS Tax Gap, # 9 Exhibit 2-8 IRS Tax Gap, # 10 Exhibit 3- Saliman Decl., # 11 Exhibit 4- Corjuo Decl., # 12 Exhibit 5- Gable Decl. & Rep., # 13 Exhibit 6- Barry Dep., # 14 Exhibit 7- Stevens Decl., # 15 Exhibit 8-

		Thompson Decl., # 16 Exhibit 9- Lichtenstein Decl. & Rep., # 17 Exhibit 10- Adler Dep.) (Snyder, Melanie) (Entered: 05/06/2011)
05/27/2011	100	BRIEF in Opposition to 99 MOTION for Partial Summary Judgment *Counts I and II (Commerce Clause)* filed by Plaintiff Direct Marketing Association, The. (Isaacson, George) Modified on 5/31/2011 to remove duplicate generated text (mnf,). (Entered: 05/27/2011)
05/27/2011	101	RESPONSE to 98 MOTION for Summary Judgment *on Counts I and II* filed by Defendant Roxy Huber. (Attachments: # 1 Exhibit Ex. 1 – HB10-1193 Reengrossed, # 2 Exhibit Ex. 2 – Williams Decl., # 3 Exhibit Ex. 3 – August 2010 Fiscal Note) (Snyder, Melanie) (Entered: 05/27/2011)
06/10/2011	102	REPLY to Response to 98 MOTION for Summary Judgment *on Counts I and II* filed by Plaintiff Direct Marketing Association, The. (Isaacson, George) (Entered: 06/10/2011)
06/10/2011	103	REPLY to Response to 99 MOTION for Partial Summary Judgment Counts I and II (Commerce Clause filed by Defendant Roxy Huber. (Attachments: # 1 Exhibit Hubbell v. Carney Bros. Const.) (Snyder,

Melanie) Modified on 6/13/2011 to remove repetitive text (sah,). (Entered: 06/10/2011)

* * *

03/30/2012	105	ORDER Concerning Cross Motions for Summary Judgment. Granting 98 Plaintiff's Motion for Summary Judgment as to Counts I and II Alleging Violations of the Commerce Clause. Denying 99 Defendant's Motion for Partial Summary Judgment – Counts I and II (Commerce Clause). Roxy Huber is permanently enjoined and restrained as set forth in the order. Court will address in separate order parties' request to certify this order as a final judgment under Fed.R.Civ. P. 54(b), by Judge Robert E. Blackburn on 3/30/12.(gmssl,) (Entered: 03/30/2012)
04/27/2012	106	NOTICE OF APPEAL as to 105 Order on Motion for Summary Judgment, Order on Motion for Partial Summary Judgment, by Defendant Roxy Huber (Filing fee $ 455, Receipt Number 1082-2814185) (Attachments: # 1 Defendants' Status Report) (Snyder, Melanie) Counsel informed court that they will be refiling the status report as a separate document rather than the attachment to the Notice of Appeal. Modified on

		4/27/2012 to add text concerning the status report being refiled (lswsl,). (Entered: 04/27/2012)
04/27/2012	107	STATUS REPORT by Defendant Roxy Huber. (Snyder, Melanie) (Entered: 04/27/2012)
04/30/2012	108	LETTER Transmitting Notice of Appeal to all counsel advising of the transmittal of the 106 Notice of Appeal, filed by Roxy Huber to the U.S. Court of Appeals. (Retained Counsel, Fee paid,) (Attachments: # 1 Docket Sheet, # 2 Preliminary Record) (lswsl,) (Entered: 04/30/2012)
04/30/2012	109	USCA Case Number 12-1175 for 106 Notice of Appeal, filed by Roxy Huber. (lswsl,) (Entered: 04/30/2012)
		* * *
05/14/2012	111	TRANSCRIPT ORDER FORM re 106 Notice of Appeal,, by Defendant Barbara Brohl (Scoville, Stephanie) (Entered: 05/14/2012)
05/14/2012	112	LETTER TO USCA and all counsel certifying the record is complete as to 106 Notice of Appeal, filed by Roxy Huber. A transcript order form was filed stating that a transcript is not necessary. (Appeal No. 12-1175) Text Only Entry (lswsl,) (Entered: 05/14/2012)
		* * *

04/04/2013	114	ORDER of Administrative Closure. By Judge Robert E. Blackburn on 4/4/2013. (klyon,) (Entered: 04/04/2013)
08/20/2013	115	USCA OPINION as to 106 Notice of Appeal,, filed by Roxy Huber : We remand for the district court to dismiss DMAs Commerce Clause claims for lack of jurisdiction, dissolve the permanent injunction entered against the Department, and take further appropriate action consistent with this opinion (USCA Case No. 12-1175) (This document is not the Mandate) (Attachments: # 1 Judgment) (dbrow,) (Entered: 08/20/2013)
10/09/2013	116	MANDATE of USCA as to 106 Notice of Appeal,, filed by Roxy Huber : (USCA Case No. 12-1175) (dbrow,) (Entered: 10/09/2013)
12/02/2013	117	MOTION to Reopen Case *Dissolve Injunction and Dismiss all Claims without Prejudice Pursuant to FRCP 12(h)(3)* by Defendant Barbara Brohl. (Snyder, Melanie) (Entered: 12/02/2013)
12/10/2013	118	ORDER Dismissing Commerce Clause Claims and Dissolving Injunction. The Commerce Clause claims of the plaintiff, as stated in Counts I and II of the First Amended Complaint [# 10] filed

		7/23/2010, are DISMISSED for lack of jurisdiction. The permanent injunction against enforcement of the provisions of §39-21-112(3.5), C.R.S. (2010) (the Act) and the regulations promulgated thereunder, 1Colo. Code Regs. § 201-1:39-21-112.3.5 (2010) (the Regulations), as ordered in the Order Concerning Cross Motions for Summary Judgment [# 105] filed 3/30/2012, pages 21 and 22, paragraphs four and five, is DISSOLVED. By Judge Robert E. Blackburn on 12/10/2013. (klyon,) (Entered: 12/10/2013)
12/23/2013	119	STIPULATION of Dismissal of Case *Assented to Stipulation of Dismissal Without Prejudice of Non-Commerce Clause Claims* by Plaintiff Direct Marketing Association, The. (Schaefer, Matthew) (Entered: 12/23/2013)
12/23/2013	120	RESPONSE to 117 MOTION to Reopen Case *Dissolve Injunction and Dismiss all Claims without Prejudice Pursuant to FRCP 12(h)(3)* filed by Plaintiff Direct Marketing Association, The. (Schaefer, Matthew) (Entered: 12/23/2013)
12/31/2013	121	ORDER: The Assented To Stipulation of Dismissal Without Prejudice of Non-Commerce Clause Claims [# 119] filed 12/23/2013, is

		APPROVED. Counts III-VIII (the "non-Commerce Clause claims") of plaintiff's First Amended Complaint are DISMISSED WITHOUT PREJUDICE to the plaintiff to refile such claims if the United States Supreme Court reverses the judgment of the Tenth Circuit Court of Appeals issued 8/20/2013, with each party to bear its own costs and attorney fees. By Judge Robert E. Blackburn on 12/31/2013. (klyon,) (Entered: 12/31/2013)
02/27/2014	122	Supreme Court LETTER re 106 Notice of Appeal filed by Roxy Huber. The petition for a writ of certiorari in the above entitled case was filed on February 25, 2014 and placed on the docket February 27, 2014 as No. 13-1032. (USCA Case No. 12-1175) (dbrow,) (Entered: 03/03/2014)

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Date Filed	Docket Text
04/30/2012	Civil case docketed. Preliminary record filed. DATE RECEIVED: 04/30/2012. Docketing statement due 05/14/2012 for Barbara Brohl. Transcript order form due 05/14/2012 for Stephanie Lindquist Scoville, Melanie J. Snyder and Jack M. Wesoky. Notice of appearance due on 05/14/2012 for Barbara Brohl and Direct Marketing Association [12-1175]
	* * *
05/11/2012	Docketing statement filed by Barbara Brohl. Served on 05/11/2012. Manner of Service: ECF/NDA [12-1175] SLS
	* * *
05/14/2012	Filed notice record is complete. Text only entry on district court docket. Served on 05/14/2012. Appellant's brief and appendix due on 06/25/2012 for Barbara Brohl [12-1175]
	* * *
06/25/2012	Appellant/Petitioner's brief filed by Barbara Brohl. 7 paper copies to be provided to the court. Served on 06/25/2012 by ECF/NDA. Oral argument requested? Yes. [12-1175] SLS

06/25/2012 Appendix filed by Appellant Barbara Brohl, 2 copies. Appendix pages: 3295. Number of volumes: 13. Hardcopy only. Served on 06/25/2012. Manner of Service: US mail. [12-1175]

* * *

07/02/2012 Motion submitted by Multistate Tax Commission for leave to file an amicus brief. Served on: 07/02/2012 Manner of service: email. [12-1175] – [Edited 07/03/2012 by LG to remove PDF as pleading was filed on 7/3/2012] SKS

07/02/2012 Amicus Curiae brief submitted by Multistate Tax Commission. 7 paper copies to be provided to the court. Served on 07/02/2012. Manner of Service: email. [12-1175] SKS

07/03/2012 Motion for leave to file an amicus brief and become amici filed by Movant Multistate Tax Commission. Served on 07/02/2012. Manner of Service: ECF/NDA. [12-1175]

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07/11/2012 Notice of deficient amicus brief filed by Multistate Tax Commission. Type of deficiency; the font is too small on the hard copies. Amicus brief due 07/23/2012 for Multistate Tax Commission. [12-1175] – [Edited 07/17/2012 by AD – corrected brief filed 07/17/2012]

* * *

07/17/2012 Motion filed by Amicus Curiae Multistate Tax Commission to file corrected/ substitute brief. Served on: 07/17/2012. Manner of service: email. [12-1175] SL

07/17/2012 Order filed by Clerk of the Court granting Multistate Tax Commission's motion to file a corrected brief. The corrected brief submitted with the motion shall be filed as of the date of this order. Served on 07/17/2012. [12-1175]

07/30/2012 Appellee/Respondent's brief filed by Direct Marketing Association. 7 paper copies to be provided to the court. Served on: 07/30/2012. Manner of service: email. Oral argument requested? Yes. [12-1175] GSI

07/31/2012 Minute order filed – Appellant's optional reply brief now due 08/16/2012 for Barbara Brohl. (Text Only – No Attachment) [12-1175]

08/16/2012 Appellant/Petitioner's reply brief filed by Barbara Brohl. 7 paper copies to be provided to the court. Served on 08/16/2012. Manner of Service: ECF/NDA. [12-1175] SLS

09/13/2012 Calendar notice sent to counsel. Arguments to be held on Wednesday, November 7, 2012 at 9:00 A.M. in Courtroom 1, Byron White United States Courthouse, Denver, CO. Counsel is required to go to http://www.ca10.uscourts.gov under the argument calendar tab to obtain an important notice regarding calendared cases and required forms. The calendar acknowledgment form (and the custody status form when applicable) must be completed and filed with the clerk via Electronic Case Filing within 10 days of today's date. [12-1175] Amicus curiae do not present oral argument without special permission from the court. Counsel for Amici do not need to file the acknowledgment form unless permission to argue has been granted by order of this court.

* * *

11/07/2012	Case argued by Melanie Snyder for the Appellant; George Isaacson for the Appellee; and submitted to Judges Briscoe, Gorsuch and Matheson. [12-1175]
08/20/2013	Remanded; Terminated on the merits after oral hearing; Written, signed, published;. Judges Briscoe, Gorsuch and Matheson, authoring judge. Mandate to issue. [12-1175]
08/20/2013	Judgment for opinion filed. [12-1175]
08/26/2013	Motion filed by Appellee Direct Marketing Association to extend time to file petition for rehearing until 09/18/2013. Served on: 08/26/2013. Manner of service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [12-1175] GSI

08/26/2013	Order filed by Clerk of the Court granting appellee's motion to extend time to file petition for rehearing. Any petition for rehearing shall be filed by September 18, 2013. No further extensions will be granted on the clerk's authority. Served on 08/26/2013. [12-1175]
09/18/2013	Petition for rehearing filed by Direct Marketing Association. Served on 09/18/2013. Manner of Service: email. [12-1175]
10/01/2013	Order filed by Judges Briscoe, Gorsuch and Matheson denying the petition for rehearing and rehearing en banc filed by Appellee Direct Marketing Association. [12-1175]
10/09/2013	Mandate issued. [12-1175]
12/27/2013	Notice that an application for extension of time to file petition for writ of certiorari was granted filed by Direct Marketing Association. Order and Served on 12/19/2013. Manner of Service: US mail. [12-1175]
02/28/2014	Petition for writ of certiorari filed by Direct Marketing Association on 02/25/2014. Supreme Court Number 13-1032. [12-1175]
07/01/2014	Supreme court order dated 07/01/2014 granting certiorari filed. [12-1175]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 10-cv-01546-REB-CBS

The Direct Marketing Association,

Plaintiff,

v.

Roxy Huber, in her capacity as Executive Director, Colorado Department of Revenue,

Defendant.

DECLARATION OF PROFESSOR WILLIAM FOX

(Filed May 6, 2011)

I, William F. Fox, pursuant to 28 U.S.C. § 1746 do depose and state as follows:

1. I am a William B. Stokely Distinguished Professor of Business and Director in the Center for Business and Economic Research at the University of Tennessee. I have been retained by the Office of the Colorado Attorney General, counsel to the Defendant, Roxy Huber, Executive Director of the Colorado Department of Revenue, to present my opinions on the sales and use tax losses for Colorado from e-commerce sales.

2. My opinions and conclusions are set forth in my report, dated November 5, 2010 and attached as Exhibit A, which is expressly incorporated in this declaration.

3. In providing my opinion I have relied on my experience, education, and knowledge in the areas of economics, taxation, and state and local government taxation. I have also reviewed the following documents supplied to me by the Colorado Attorney General's Office:

The First Amended Complaint in *The Direct Marketing Association, Plaintiff v. Roxy Huber, Defendant*

House Bill 10-1193

Regulation 39-21-112.3.5

Additionally, I have relied on the academic articles and documents referenced and cited in my report.

4. My qualifications and the publications I have authored are contained in the curriculum vitae submitted with my report. My report also includes the matters in which I testified as an expert during the last four years and the compensation I am receiving for my services in this matter, $350.00 per hour.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 12th day of November, 2010.

/s/ William F. Fox

s/ William F. Fox

William F. Fox

Electronic Commerce and Sales and Use Tax Revenues in Colorado

William F. Fox
Director, Center for Business and Economic Research
William B. Stokely Distinguished Professor of Business
November 5, 2010

I am William F. Fox, William B. Stokely Distinguished Professor of Business and Director in the Center for Business and Economic Research at the University of Tennessee. I am offering this opinion in the matter of The Direct Marketing Association v. Roxy Huber. I am an expert in economics, taxation, and state and local government taxation. Much of my research and analysis over a career spanning more than 30 years has focused on sales and use taxes. In offering this opinion I am relying on my experience, education and knowledge in the areas of economics, taxation, and state and local government taxation. My vita is attached and a list of additional reports that I have authored or co-authored in recent years is also attached. I have not provided testimony in court cases during the past four years, but I gave a deposition and testified in 2007 in the Williamson Medical Center/Spring Hill Hospital Certificate of Need Application: CN0604-028.

In forming my opinion I considered a number of papers and articles including the documents described below. The exhibits that may be used to summarize or support my opinion include the documents described below including:

- "State and Local Government Sales Tax Revenue Losses from Electronic Commerce," by Donald Bruce, William F. Fox, and LeAnn Luna, *State Tax Notes* 52(7):537-558, May 18, 2009.
- "State and Local Sales Tax Revenue Losses from E-Commerce: Estimates as of July 2004," by Donald Bruce and William F. Fox, *State Tax Notes* 33(7):511-518, August 16, 2004.
- "State and Local Sales Tax Revenue Losses from E-Commerce: Updated Estimates," by Donald Bruce and William F. Fox. *Prepared for the Institute for State Studies (ISS), Salt Lake City, Utah,* September 2001
- "E-Commerce in the Context of Declining State Sales Tax Bases," by Donald Bruce and William F. Fox, *National Tax Journal* 53(4), Part 3, 2000, pp. 1373-1388.
- Other articles, documents and websites footnoted and referenced in this document.

The estimates and methodology discussed below are drawn specifically from the 2009 report written by several colleagues and myself that was referenced above.

I have been retained by Melanie Snyder of the Colorado Office of the Attorney General to offer this opinion. I am receiving $350 per hour plus expenses for work associated with this report and for any testimony. Stephanie Scoville from the Office of the

Attorney General provided me with three documents including:

- The First Amended Complaint in The Direct Marketing Association, Plaintiff v. Roxy Huber, Defendant
- House Bill 10-1193
- Regulation 39-21-112.3.5

Statement of Opinions and Methodology Offered

Introduction

Electronic commerce has grown rapidly for more than a decade. E-commerce, which totaled approximately $1.06 trillion in 2000, tripled to $3.16 trillion in 2008, representing a 14.6 percent compound annual growth rate.[1] The advent of electronic commerce and other forms of remote commerce has several major effects on state and local governments and their economies. First, state and local governments fail to collect some sales and use taxes that are due based on existing statutes because of lesser required vendor compliance and weak use tax compliance. Second, the U.S. and state economies are hurt when firms alter their business practices to avoid establishing a compliance responsibility, since businesses will not provide goods and services using the least economic resources. Third, main street businesses lose sales as consumers and businesses are encouraged to purchase remotely so that they can evade sales and use taxes. State and local governments collect sales taxes very effectively from Main Street vendors because they are required to collect sales tax and their compliance is much more effectively audited. States collect taxes due on e-commerce much less effectively because vendors are often not required to remit the tax and buyer compliance with the use tax is frequently very weak.

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[1] E-commerce sales are the sum of manufacturing shipments, wholesale merchants less manufacturers' sales branches and offices, retail trade sales and selected service revenues.

This report focuses on the first of these three effects, the revenue losses for state and local governments and specifically for Colorado because of the inability to collect taxes on sales made via e-commerce. The estimates are for sales and use taxes, but are almost exclusively use taxes that are due but cannot be effectively administered. Every state that imposes a sales tax also levies a corresponding use tax. The use tax is generally "imposed upon the storage, use or consumption of tangible personal property within the state."[2] The intent is primarily to collect use taxes from buyers in cases where the sales tax has not already been obtained, so credit is normally permitted for sales tax already paid. Most of the use tax that is due arises from sales by out-of-state firms that do not have nexus in Colorado or do not voluntarily collect for the state.

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[2] John F. Due and John L. Mikesell, Sales Taxation: State and Local Structure and Administration," The Urban Institute Press: Washington, 1995, p. 47.

Estimated Sales and Use Tax Losses for Colorado

We estimate that Colorado state and local governments will fail to collect $130.7 million in 2010, $153.7 million in 2011 and another $172.7 million in 2012 in state and local sales or use taxes that are due on e-commerce sales. These annual losses are approximately 3 percent of actual 2007 state and local sales taxes. Losses arise both from business sales to final consumers (B2C sales) and from business sales to other businesses (B2B sales). B2B sales account for approximately 93 percent of e-commerce sales. The state also loses revenues that are uncollected on other forms of remote sales, such as from mail order firms – these effects are not included in our estimates.

The loss estimates are not to suggest that no tax revenues are collected on e-commerce sales to Colorado buyers. We estimate that in Colorado $612.7 million will be due on e-commerce sales in 2011, of which the state and local governments can expect to collect approximately $459.0 million. Thus, we estimate that approximately 75 percent of due revenue is collected, leaving 25 percent non-compliance on e-commerce transactions. Most of the non-compliance results because firms without taxable presence or bricks and mortar stores are not required to collect sales taxes or to report the sales into Colorado (although Colorado now has reporting requirements). The 25 percent non-compliance with e-commerce sales compares with approximately 1.7 percent non-compliance for the sales tax. Almost all of the sales tax is collected by firms operating in Colorado, thereby creating a wide discrepancy between the sales and use taxes collected by some Colorado firms and some e-commerce firms.[3]

We believe that our estimates are conservative and the actual loss to Colorado is likely larger. As described below, our forecasts of the extent of national e-commerce are low, and data reported since our results were prepared indicate that e-commerce sales were much higher than we forecast. Also, we expect that estimates we used of the taxability of various categories of e-commerce will understate the actual propensity of these sales to be taxable, as discussed below.

Methodology

The report used six steps to estimate state and local sales tax revenue losses associated with e-commerce in Colorado (and other states). Estimating electronic commerce sales for the nation is the starting point for the analysis. We purposefully forecast e-commerce sales with the intent to be conservative so that our revenue loss estimates are on the low side of our actual expectations. Aggregate e-commerce sales were estimated by finding the relationship from 1998 through 2006 between e-commerce as measured by the U.S. Census Bureau[4] and economic activity (GDP) as measured by the U.S. Bureau of Economic Analysis.[5] Then, e-commerce was forecast from 2007 through 2012 using Global Insights' November 2008 baseline and optimistic forecasts.[6] The resulting forecast had e-commerce sales rising from the U.S. Census estimate of $2.385 trillion in 2006[7] to $3.92 trillion in 2012, an annual increase of just under 9 percent. The growth rate implicit in the forecast was much lower than the history of e-commerce sales, consistent with our aim to be conservative. Subsequent Census Bureau reports on e-commerce sales for 2007 and 2008 confirm our conservative approach. Our baseline estimates are 12.5 percent and 15.9 percent lower than the current Census estimates of e-commerce for 2007 and 2008, respectively. Our e-commerce estimates were then allocated across 51 groupings of sales by industry based on the 2006 distribution of e-commerce reported by the Census Bureau.

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[3] See http://dor.wa.gov/Docs/Reports/ComplianceStudy/compliance_study_2008.pdf The Washington study reports 1.7 percent non-compliance with the sales tax.

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[4] http://www.census.gov/econ/estats/2008/2008tables.html We used the data from this website as it was available at the time the report was prepared. The data are regularly updated and may have subsequently changed.

[5] http://bea.gov/national/nipaweb/TableView.asp?SelectedTable=5&ViewSeries=NO&Java=no&Request3Place=N&3Place=N&FromView=YES&Freq=Year&FirstYear=2009&LastYear=2010&3Place=N&Update=Update&JavaBox=no We used the data from this website as it was available at the time the report was prepared. The data are regularly updated and may have subsequently changed.

[6] E-commerce activity was forecast for 2007 and 2008 even though these years had already taken place, because U.S. Census data on e-commerce activity for those years were not available when the report was written.

[7] The Census Bureau has since revised its 2006 e-commerce estimate to $2.431 trillion.

States can fail to collect sales and use taxes that are due on both B2B and B2C e-commerce based sales, which together comprise the $3.92 trillion e-commerce sales estimate for 2012. Therefore, it was imperative to build our analysis of sales and use tax losses on both types of sales. Four broad groups of sales, encompassing both B2B and B2C, are included in the Census data and in the information used in our analysis. These four include manufacturing shipments of e-commerce, merchant wholesale trade (we exclude manufacturers' sales branches and offices to avoid double counting), retail trade, and selected services revenues. Many B2B purchases, such as vehicles, office equipment and supplies, and furniture are frequently taxable.

Second, state-level e-commerce sales are not available so it was necessary to distribute the national estimates across states. E-commerce sales were allocated across sales taxing states based on their share of total adjusted state and local sales tax revenues, using adjustment factors developed by John

Mikesell.[8] This allocated about 1.7 percent of national e-commerce sales in each category to Colorado, a percentage that is slightly under Colorado's share of total national personal income.

Third, we estimated taxability based on a survey of the research staffs of individual state Departments of Revenue. The expectation is that Departments of Revenue are in the best position to respond to the taxability of broad categories of transactions. The survey sought to determine the extent to which 51 categories of vendor sales are taxable under Colorado's (and other states') statutes. Colorado was one of 29 states that responded to the survey. The Colorado responses, weighted by the 2006 Census e-commerce sales by vendor, resulted in an estimate that 16.16 percent of Colorado e-commerce sales are taxable (though we actually apply the taxability by category of sales rather than using this average). We believe that the survey underestimates actual taxability for a series of reasons. First, buyers will tend to make relatively more taxable than nontaxable purchases over the Internet because they will be required to pay sales tax when they purchase taxable items in Colorado and may not be required to pay tax when purchased outside the state (because of noncompliance). Also, it is likely that the research staffs underestimated the taxability because they are generally reporting on the basis of actual tax collections, rather than on the basis of the actual tax due.

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[8] John L. Mikesell, "State Sales Taxes in Fiscal 2007," *State Tax Notes*, May 26, 2008, pp. 647-652.

Fourth, we estimated taxes that are due in Colorado by multiplying the state's e-commerce sales times the percent that is taxable in the state times the average state and local sales tax rate. The state sales tax rate was taken from Sales Tax Clearinghouse, and was 2.9 percent for Colorado.[9] The average local tax rate was calculated by dividing local sales tax revenue as available from the U.S. Census Bureau by the estimated state sales tax base.[10] The estimated local average rate was 3.714 percent. The state sales tax base was measured as state sales tax revenues divided by the state sales tax rate.

Fifth, we estimate sales tax compliance for B2B and B2C purchases. Both B2B and B2C compliance are estimated as functions of vendor compliance for the sales tax and use tax compliance by the buyer. Vendor compliance relies on a survey of large Internet vendors and the Maryland Long Tail Study.[11] Our survey found that large vendors will collect tax on 65.6 percent of sales to Colorado buyers. Vendor compliance by smaller Internet vendors is assumed to be very small. B2B use tax compliance relies on a study by the State of Washington Department of Revenue[12] and B2C relies on assumptions about consumer compliance with the use taxes. B2C compliance is widely believed to be very poor except in those cases where third party reporting is available, such as when an automobile must be registered in Colorado and much of the previously unpaid tax is collected.

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[9] See http://www.taxch.com/STRates.stm We used the data from this website as it was available at the time the report was prepared. The data are regularly updated.

[10] http://www.census.gov/govs/estimate/index.html

[11] Joe Bailey, et al. "The Long Tail is Longer than you Think: The Surprisingly Large Extent of Online Sales by Small Volume Sellers," University of Maryland, May 12, 2008, draft.

Finally, tax losses are estimated as the difference between taxes due, as described in step 4, and taxes collected, as described in step 5.

Dated: November 5, 2010

/s/ William F. Fox

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[12] See http://dor.wa.gov/Docs/Reports/Compliance.Study/compliance.study.2008.pdf

Update on Reducing the Federal Tax Gap and Improving Voluntary Compliance

[SEAL]

(Filed May 6, 2011)

U.S. Department of the Treasury

July 8, 2009

I. Introduction

The Internal Revenue Service (IRS) collects 96 percent of the government's total receipts, approximately $2.7 trillion in FY 2008. The vast majority of those revenues come from taxpayers who voluntarily report and pay the taxes that they owe. The IRS has estimated the overall voluntary compliance rate to be approximately 84 percent.

Despite the voluntary compliance rate and vigorous enforcement by the IRS, a significant amount of revenue remains unreported and unpaid. In 2005, the IRS estimated this gross tax gap to be approximately $345 billion. After subtracting revenue obtained through enforcement actions and other late payments, the IRS estimated the net tax gap to be approximately $290 billion. These estimates, which remain the most recent estimates available, were conducted using data collected in tax year 2001 and before.

As a result of an increase in funding included in the IRS FY 2009 budget, the Department of the Treasury (Treasury) and the IRS have recently initiated intensive efforts to update the estimate of the tax gap on an ongoing basis, which will permit more regular and effective assessments. Consistent with its commitment to long-term fiscal soundness, the Administration is committed to working closely with Congress to narrow the tax gap, which imposes an unfair burden on every American who pays taxes in full. Ongoing updates of the tax gap estimate starting in 2011 will form the basis for regularly assessing progress towards that goal.

Building on reports previously released, this report is intended to provide a comprehensive overview of efforts to close the tax gap. This report is also intended to serve as a baseline for further work and discussion. After briefly discussing the nature and scope of the tax gap, this report summarizes previous Treasury and IRS tax gap reports and identifies the areas of strategic priority detailed in those reports. This report then summarizes the achievements, ongoing efforts, and new initiatives for achieving progress in each of those areas of strategic priority, organized according to the components of the strategy to reduce the tax gap detailed in prior reports.

As this report will make clear, the IRS and Treasury, working with Congress, are pursuing a wide range of initiatives, including a series of legislative proposals included in the Administration's FY 2010 budget. The Administration recognizes the particular value of those efforts and initiatives that improve voluntary compliance by making the tax filing process easier and more taxpayer-friendly. While aggressive enforcement activity can also help to narrow the tax gap, it is important to recognize that increased enforcement efforts require certain trade-offs. The Administration is committed to working closely with Congress to strike an appropriate balance to maximize revenue collection without imposing unreasonable compliance and enforcement burdens on the vast majority of individuals and businesses that fully and willingly pay what they owe.

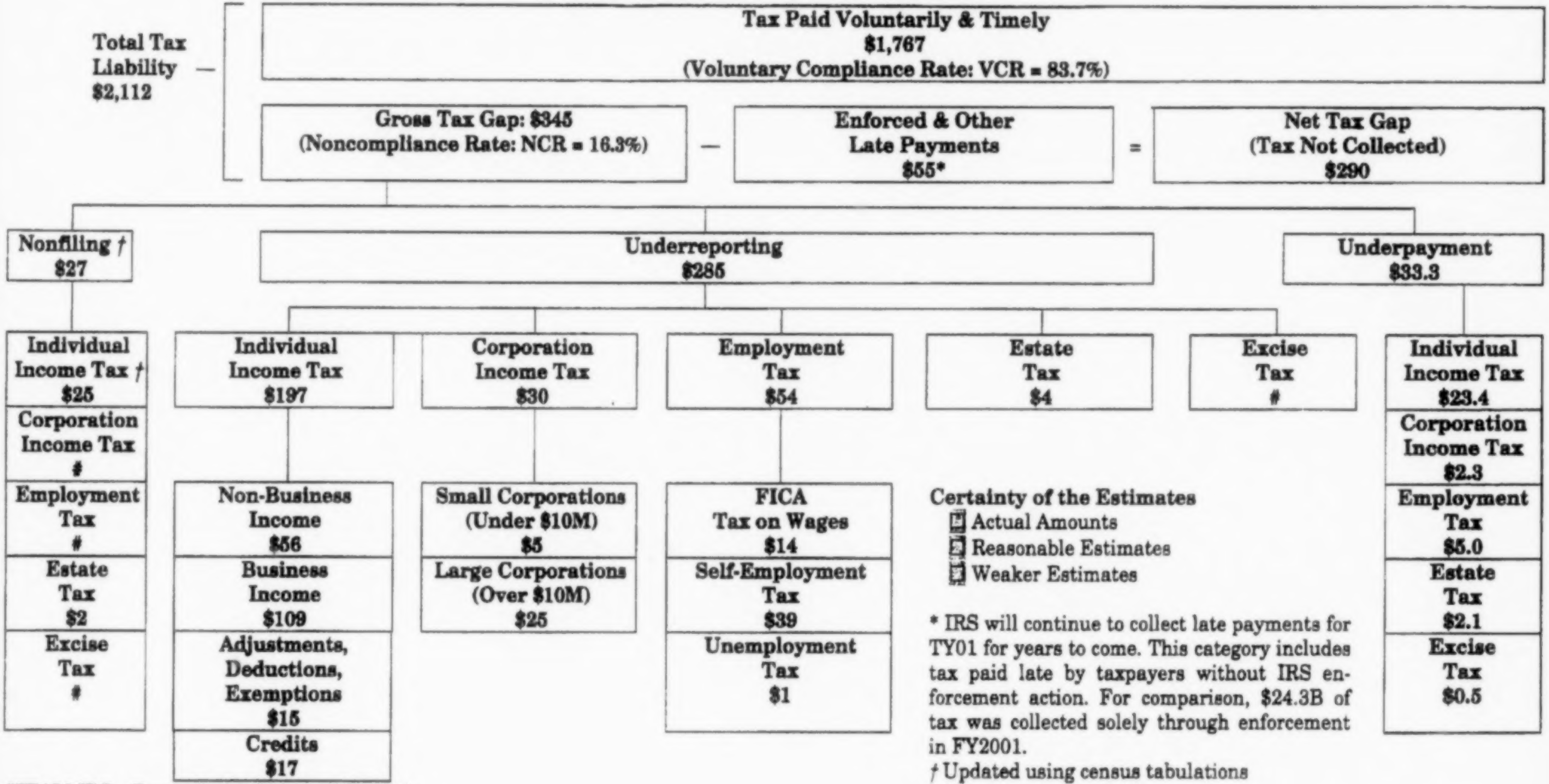
II. The Tax Gap

The Tax Gap Map that follows illustrates the nature and scope of the tax gap based on data from 2001 and prior years. As this map shows, noncompliance takes three forms:

- Underreporting (not reporting one's full tax liability on a timely-filed return);
- Underpayment (not timely paying the full amount of tax reported on a timely-filed return); and
- Nonfiling (not filing required returns on time and not paying the full amount of tax that should have been shown on the required return).

The IRS has separate tax gap estimates for each of these three types of noncompliance. Underreporting (in the form of unreported receipts and overstated expenses) constitutes over 82 percent of the gross tax gap. The single largest sub-component of underreporting involves the individual income tax, which represents more than 50 percent of the total tax gap. Underpayment constitutes nearly 10 percent, and nonfiling almost 8 percent of the gross tax gap.

TAX GAP MAP for Tax Year 2001 *(in $Billions)*


Total Tax Liability $2,112
Tax Paid Voluntarily & Timely $1,767 (Voluntary Compliance Rate: VCR = 83.7%)
Gross Tax Gap: $345 (Noncompliance Rate: NCR = 16.3%)
—
Enforced & Other Late Payments $55*
=
Net Tax Gap (Tax Not Collected) $290
Nonfiling † $27
Individual Income Tax † $25
Corporation Income Tax #
Employment Tax #
Estate Tax $2
Excise Tax #
Underreporting $285
Individual Income Tax $197
Non-Business Income $56
Business Income $109
Adjustments, Deductions, Exemptions $15
Credits $17
Corporation Income Tax $30
Small Corporations (Under $10M) $5
Large Corporations (Over $10M) $25
Employment Tax $54
FICA Tax on Wages $14
Self-Employment Tax $39
Unemployment Tax $1
Estate Tax $4
Excise Tax #
Underpayment $33.3
Individual Income Tax $23.4
Corporation Income Tax $2.3
Employment Tax $5.0
Estate Tax $2.1
Excise Tax $0.5
Certainty of the Estimates
1 Actual Amounts
2 Reasonable Estimates
3 Weaker Estimates

* IRS will continue to collect late payments for TY01 for years to come. This category includes tax paid late by taxpayers without IRS enforcement action. For comparison, $24.3B of tax was collected solely through enforcement in FY2001.

† Updated using census tabulations

No estimates available

[SEAL] *IRS – Research, Analysis, and Statistics*

III. Prior Tax Gap Reports

In September 2006, Treasury's Office of Tax Policy issued a *Comprehensive Strategy for Reducing the Tax Gap.*[1] The 2006 report provided a primer on the components and measures of the tax gap and a seven-component strategy for reducing the tax gap. The components of that strategy are:

1. Reduce Opportunities for Evasion
2. Make a Multi-Year Commitment to Research
3. Continue Improvements in Information Technology
4. Improve Compliance Activities
5. Enhance Taxpayer Service
6. Reform and Simplify the Tax Law
7. Coordinate with Partners and Stakeholders

Following on this report, the Internal Revenue Service in August 2007 issued a more detailed report on *Reducing the Federal Tax Gap: A Report on Improving Voluntary Compliance.*[2] Emphasizing the same seven components outlined above, the 2007 report outlined specific projects and initiatives, legislative proposals, and other actions designed to attack the sources of noncompliance in each area. Four key principles guided the development of the strategy and continue to guide Treasury and IRS efforts to improve compliance:

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[1] "Comprehensive Strategy for Reducing the Tax Gap," U.S. Department of the Treasury, Office of Tax Policy, September 26, 2006.

[2] "Reducing the Federal Tax Gap: A Report on Improving Voluntary Compliance," Internal Revenue Service, Department of the Treasury. August 2. 2007.

- First, both unintentional taxpayer errors and intentional taxpayer evasion should be addressed.
- Second, sources of noncompliance should be targeted with specificity.
- Third, enforcement activities should be combined with a commitment to taxpayer service.
- Fourth, policy positions and compliance proposals should be sensitive to taxpayer rights and maintain an appropriate balance between enforcement activity and imposition of taxpayer burden.

The 2007 tax gap report also provided a detailed explanation of the composition of the tax gap. That explanation is reproduced in full in the appendix of this report.

IV. Update on Efforts to Reduce the Federal Tax Gap: Progress on Strategic Components

The prior tax gap reports detailed a seven-component strategy to reduce the tax gap and discussed and proposed specific actions to be taken within each component. This section of the report provides an update on those efforts, including a discussion of new proposals. The following section discusses the current IRS Strategic Plan, issued subsequent to the 2007 tax gap report, which covers FY 2009-2013, and outlines five long-term measures for evaluating the IRS' progress in achieving its goals, which directly relate to the tax gap strategy.

Component 1: Reduce Opportunities for Evasion

Implement and Expand Information Reporting Authorities

Previous reports have outlined the relationship between voluntary compliance and the degree to which income tax return items are "visible" to the IRS. Reporting compliance is highest where parties other than the taxpayer are required to file information reports and withhold taxes from payments made.

From the taxpayer's perspective, information reporting can lead to significant administrative simplification. Most Americans receive W-2 forms at the end of each year, which reduces the taxpayer's burden by eliminating the need to gather records or perform computations. W-2 recipients with no other major source of income can simply transcribe information from the W-2 form directly onto the tax return. For those taxpayers who e-file, the process is simplified even further, as the data from the W-2 can be electronically imported. At the same time, W-2 forms facilitate the ability of the IRS to detect noncompliance.

To improve compliance and minimize error, Treasury and IRS have been focused on implementing several new information reporting regimes recently authorized by Congress.

- **Credit and debit card payments to businesses.** Starting in January 2011, organizations that process credit and debit card payments for merchants must annually report the amount of these payments to the recipient businesses and to the IRS. Treasury and IRS are actively working on the implementing regulations and soliciting input and feedback from taxpayers, banks, and credit card processors.
- **Cost basis reporting.** Starting in January 2011, brokerage firms must annually report cost basis and holding period information to customers and to the IRS in addition to gross proceeds from securities transactions. These information reports will make it easier for taxpayers to compute the net amount of gain or loss and will have a significant effect on reducing misreported capital gains.

In addition, the Administration's budget for FY 2010 includes the following significant new information reporting proposals:

- **Payments to Corporations.** The FY 2010 budget proposals would require businesses to file information returns for payments to a corporation for any services (such as accounting services or consultancy services) or certain gains aggregating to $600 or more per year. This would end current practice under a longstanding regulatory regime that exempts certain payments to corporations from general requirements for information reporting. These information reports will serve as reminders to the corporate recipients to include these amounts in gross receipts and will make these amounts visible to the IRS for targeted compliance programs.
- **Rental Property Expense Payments.** The FY 2010 budget proposals would require taxpayers who receive rental income and deduct expenses on rental activities to file information returns for rental property expense payments to any service provider or contractor that performs work on rental properties. This would make the reporting requirements for taxpayers engaged in rental real estate activities consistent with the requirements for other business taxpayers.
- **Certain Government Payments for Property and Services.** Some government vendors fail to meet their tax filing and payment obligations, and compliance would likely increase significantly

if those payments were automatically reported by the governmental entity making the payment. The FY 2010 budget proposals would therefore require Federal, state, and local governments to report information on non-wage payments made for the procurement of property or services. Exceptions are anticipated for certain categories of payments and recipients.

- **Private Separate Accounts of Life Insurance Companies.** The proposals would require life insurance companies to report account information for any contracts invested in a private separate account. The reporting of this information would help the IRS determine whether earnings on investments in separate accounts are taxable income to the holder or are tax-free or tax-deferred.
- **Requiring Certified Taxpayer Identification Numbers (TINs) from Contractors.** Without accurate taxpayer identifying information, the effectiveness of information reporting requirements is limited. Therefore, the FY 2010 budget proposal would require contractors to provide TINs to the businesses from which they receive payments, and require those businesses to verify the TINs. If a contractor failed to furnish an accurate certified TIN, the business paying the

contractor would be required to withhold.

- **Increased Penalties for Failure to Properly Report Information.** Penalties for failure to properly report information have not been increased since they were first established in 1989. Increasing those penalties will provide a stronger incentive for compliance with information reporting requirements. Accordingly, the FY 2010 budget proposal would increase by 100 percent the current per-return penalties for failure to file most information returns and would substantially increase the maximum penalties that can be assessed in a calendar year. In addition, the proposal calls for adjusting the penalty amounts for inflation every five years.

Additional Fiscal Year 2010 Budget Proposals

In addition to the information reporting proposals outlined above, the Administration's FY 2010 budget proposes an expansive set of additional tools or requirements to reduce opportunities for evasion and other non-compliance.

Improving compliance by businesses:

- **E-filing by Certain Large Organizations.** Mandate electronic filing for all corporations and partnerships required to file Schedule M-3 (Net Income or Loss

Reconciliation). Expand the current regulatory authority to require e-filing by other large organizations (such as certain large exempt organizations). This would provide tax return information in a more uniform electronic form, enhancing the ability of the IRS to focus more productively its audit activities.

- **Clarification of Liability for Federal Employment Taxes of Employee Leasing Companies and Their Clients.** Set forth standards for holding employee leasing companies jointly and severally liable with their clients for Federal employment taxes under certain circumstances. Providing standards for when an employee leasing company and its clients will be held liable for Federal employment taxes will facilitate the assessment, payment, and collection of those taxes.

Strengthening Tax Administration:

- **Assessment of Criminal Restitution as Tax.** Allow the IRS and Treasury to immediately assess, without issuing a statutory notice of deficiency, and collect as a tax debt court-ordered restitution in criminal tax cases. Since court-ordered restitution in criminal tax cases currently cannot be assessed as a tax, the IRS cannot use its existing assessment systems to collect and enforce the restitution obligations. This leads to unnecessary duplication of effort, delay, and confusion.

- **Offer-In-Compromise Application Rules.** Eliminate the current-law requirement that an initial offer-in-compromise include a nonrefundable payment of a portion of the taxpayer's offer. Eliminating this requirement would expand access to the offer-in-compromise program and thereby improve IRS' ability to collect the portion of a tax liability that the taxpayer can pay.
- **IRS Access to Information in the National Directory of New Hires (NDNH).** Expand IRS access to the NDNH for general tax administration purposes, including data matching, verification of taxpayer claims during return processing, and preparation of substitute returns for non-compliant taxpayers. Access to the NDNH would increase IRS productivity by reducing the amount of IRS resources dedicated to obtaining and processing data without reducing the current levels of taxpayer privacy.
- **Repeated Willful Failure to File a Tax Return.** Create an aggravated failure-to-file criminal penalty for any person who willfully fails to file tax returns in any three years of five consecutive years if the aggregated tax liability is at least $50,000. Such failure to file would be classified as a felony with a penalty of

a fine of not more than $250,000 ($500,000 for a corporation) or imprisonment of not more than five years, or both. These increased criminal penalties would help deter multiple willful failure-to-file tax returns.

- **Tax Compliance with Local Jurisdictions.** Treat Indian Tribal Governments (ITGs) that impose alcohol, tobacco, or fuel excise or income or wage taxes as States for purposes of information sharing to the extent necessary for ITG tax administration. Treating ITGs as States for information sharing purposes would allow greater sharing of information between the Federal government and ITGs and thereby support Federal and ITG compliance activities.
- **Statute of Limitations where State Tax Adjustment Affects Federal Tax Liability.** Create an additional exception to the general three-year statute of limitations for assessment of Federal tax liability resulting from adjustments to State or local tax liability. The statute of limitations would be extended only for items related to the State tax adjustment. The proposal would remove the current statute of limitations as a barrier to the effective use by the IRS of state and local tax adjustment reports when the reports are provided by the state or local revenue agency to the IRS with

little time remaining to make assessments at the Federal level.

- **Investigative Disclosure.** Clarify that the taxpayer privacy laws do not prohibit Treasury and IRS officers and employees from identifying themselves, their organization, and the nature and subject of an investigation when contacting third parties in connection with a civil or criminal tax investigation. This clarification would facilitate investigations by IRS officers and employees while setting forth clear guidance for taxpayers.
- **Electronic Filing by Tax Return Preparers.** Permit regulations to require electronic filing by tax return preparers who file more than 100 tax returns in a calendar year. Electronic filing benefits taxpayers and the IRS because it decreases processing errors, expedites processing and payment of tax refunds, and allows the IRS to efficiently maintain up-to-date taxpayer records.

Expand Penalties

- **Bad Check Penalty.** Clarify, expand, and update the bad check penalty to cover all commercially acceptable instruments of payment, including electronic checks and other payment forms. At present, only checks and money orders are covered by the bad check penalty.

- **Penalties for Failure to Comply with Electronic Filing Requirements.** Establish a penalty for failure to comply with electronic filing requirements of $25,000 for a corporation or $5,000 for a tax-exempt organization. This penalty would not supersede existing penalties for failure to file in any format. Although there are additions to tax for the failure to file returns under current law, there is no specific penalty in the Internal Revenue Code for failure to comply with a requirement to file electronically.

Administration's Proposals and Efforts to Combat Under-Reporting of Offshore Income

The President has made addressing under-reporting of income earned or held through offshore accounts or entities a top priority for his Administration. The Administration has developed a comprehensive approach to combating offshore tax evasion by U.S. taxpayers that includes legislative proposals, efforts to increase exchange of tax information with other countries, and increased enforcement.

Legislative Proposals

The Administration's budget for FY 2010 provides various legislative proposals to address offshore tax evasion, including:

- Reforming the existing IRS "Qualified Intermediary" (QI) program to require additional information reporting from QIs so that the IRS will receive the same level of information on U.S. taxpayers from QI participants that it does from U.S. financial institutions.

- Requiring withholding of tax, in appropriate circumstances, on payments made through intermediaries that are not QIs. This measure would discourage U.S. and foreign persons from attempting to avoid U.S. tax by providing incorrect self-certification to intermediaries or otherwise relying on the lack of information reporting required from foreign intermediaries that are not QIs.

- Denying the benefits of reduced withholding tax rates to certain foreign entities unless the entities identify their owners. This measure would help ensure that persons that are not entitled to an exemption from withholding tax or a reduced rate of withholding tax do not arrange to receive payments through entities that appear to qualify for such an exemption or reduced rate.

- Requiring taxpayers and financial institutions to report to the IRS on cross-border transfers of certain assets.

- Allowing the IRS to make certain legal presumptions to minimize the effect of nondisclosure on IRS investigations and enforcement proceedings when U.S.

taxpayers fail to fully disclose their offshore accounts.

- Extending the statute of limitations and imposing increased penalties when certain required information returns are not filed.

Exchanging Tax Information with Other Countries

Access to information from other countries is critically important to combating offshore tax evasion. For this reason, the United States has been a leader in increasing information exchange in tax matters. We have worked through the Organisation for Economic Co-operation and Development (OECD) to establish standards on transparency and exchange of information for tax purposes, and have strongly encouraged countries to adopt these standards. The United States has been more active in broadening the scope of information that countries agree to exchange through tax treaties and in negotiating and implementing tax information exchange agreements (TIEAs).

The United States will continue to update existing tax treaties with insufficient exchange of information provisions. Treasury recently concluded negotiation of updated tax treaty information exchange provisions with two key countries, Luxembourg and Switzerland, and will work toward swift ratification and implementation of those new agreements. Treasury will also continue to enter into new TIEAs, such as the agreements that the United States recently signed with Liechtenstein and Gibraltar.

The United States also will begin expanding its focus with respect to exchange of tax information from advocating international adoption of OECD standards to assessing international implementation of the standards adopted. Consistent with recommendations made by the United States, the G-20 London Summit Declaration called on appropriate bodies to conduct and strengthen objective peer review processes. Accordingly, Treasury will work to establish a robust peer review process to assess implementation of the OECD standards through an expanded version of the OECD-organized Global Forum on Transparency and Exchange of Tax Information, which currently includes OECD members and more than 40 other jurisdictions. Peer review should act to improve international implementation of tax information exchange and thereby help to ensure that such exchange helps to support U.S. taxation of income earned or held through offshore accounts or entities.

Increasing Enforcement

Finally, the President's FY 2010 budget also includes strong support for international enforcement. With the FY 2010 initiative funding, the IRS would hire nearly 800 additional employees dedicated to addressing a broad range of international tax enforcement concerns. The initiative will increase examinations of complex international structures, cross-border transactions, and offshore activity on both corporate and individual returns. The Administration's continued support of IRS enforcement is described in greater detail below.

Status Update

The following chart provides a status update on the full range of initiatives underway to reduce opportunities for evasion. In addition to the new initiatives detailed above, this chart catalogues the progress of initiatives previously reported in the 2006 and 2007 tax gap reports.

Action Items	**Status**
Work with Congress to enact legislative proposals included in the Administration's FY 2010 Budget	In process
Implement recently enacted tax gap legislative proposals	Cost basis and merchant card reporting implementation: • Issued announcement in January 2009 enabling merchant card and third party settlement organizations to begin TIN validation

	• Issued two notices in February 2009 requesting public comments on the two reporting requirements • Developing new forms, business requirements, compliance programs, and IT solutions • Preparing proposed regulations and draft forms for public comment in Summer 2009 • Participating in ongoing meetings with stakeholders to work through implementation issues Other proposals already implemented: • Revised collection due process for employment taxes • Increased preparer penalties • Implemented erroneous refund claim penalties

Develop regulations and other published guidance clarifying ambiguous areas of the law, targeting specific areas of noncompliance and preventing abusive behavior	Our goal is to release 85 percent of the items appearing on the 2008-2009 priority guidance plan by 9/30/09. Examples include rules in the following areas: • International restructurings • Repatriation of foreign earnings • Transfer pricing and cost sharing • Foreign tax credit generator transactions • Intermediary tax shelters • Withholding tax application to business income earned by foreign partners in US partnerships • Application of the excise tax on reinsurance of US risks by foreign insurers not in business in the US • Corporate "inversions" • Preparer penalties

	• Welfare benefit funds • Transactions of interest that involve charitable remainder trusts and controlled foreign corporations • By 8/30/09, will release the priority guidance plan for 2009-2010

Component 2: Make a Multi-Year Commitment to Research

Measuring the Tax Gap

In 2005, the IRS released preliminary results of a major research effort to quantify the tax gap using data from tax year 2001 and before. The IRS in following years arrived at the estimate of the gross tax gap of $345 billion for tax year 2001. An update of the tax gap estimate based on more recent data is needed, and the IRS is working on delivering such an estimate in 2011. Updated estimates will help the IRS measure progress against its existing long-term goal of an 86 percent voluntary compliance rate for Tax Year 2009.[3]

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[3] The IRS's top-level measures, goals, and timelines are published in the Appendix to its strategic plan, available at http://www.irs.gov/pub//newsroom/long_term_measures.pdf

To ensure that the Administration and Congress alike have access to more useful, up-to-date estimates of the tax gap, the Treasury and the IRS have begun to implement a long-term strategy to move away from occasional, large-scale efforts to estimate the tax gap and instead update tax gap estimates on an ongoing basis. The IRS's FY 2009 budget included funding to improve tax gap estimates, better measure non-compliance, and improve detection of non-compliance.

As part of the effort to update the tax gap estimate, the IRS is currently completing a reporting compliance study on Subchapter S corporations for 2003 and 2004 tax years, and plans to release the results later this year. The IRS is also currently conducting research on reporting compliance with the individual income tax for tax years 2006 and 2007, and will soon begin looking at tax year 2008 tax returns (filed in 2009). The data for these three years will provide the necessary baseline for regular updates to the individual income tax gap, which can begin in calendar year 2011.

The IRS is also conducting a pilot project to extend studies of individual income tax returns to include a small sample of returns with international addresses. While the research is still in exploratory stages, if representative compliance data for this population can be extrapolated, this approach could allow us to better estimate one portion of the international tax gap.

Finally, the IRS is currently preparing to launch a study of employment tax reporting and filing compliance, with field work beginning in October 2009. This study will also be conducted over multiple tax years, with the goal of eventually providing regular estimates of employment tax compliance levels and the drivers of non-compliance.

In addition to developing more recent data on which to base an updated estimate of the tax gap, the IRS will also continue to explore ways to improve research methodologies to better measure non-compliance and to improve its ability to target the sources of non-compliance.

Status Update

The following chart provides a status update on the research and measurement efforts currently underway or completed since the release of prior tax gap reports:

Action Items	**Status**
Undertake additional compliance studies, including S Corporations and individuals	• Completed S Corporation exams (analysis ongoing) • Conducted TY2006 National Research Program (NRP) Form 1040 exams (analysis ongoing)

	• Conducting TY2007 NRP Form 1040 exams (ongoing) • Provide ongoing updates to level of tax gap attributable to underpayment (as shown in the Tax Gap Map, this amount is an actual amount, not an estimate)
Update tax gap estimates using new and existing data	• In process, as described above
Research the effect of service on taxpayer compliance	• Engaging in three significant research projects linking IRS service to compliance (in process)
Research the relationship between complexity, burden, and compliance	• Preparing survey of individual taxpayers to improve burden estimates (in process) • Engaging in three research projects focusing on relationships between complexity, burden, and compliance (in process)

Component 3: Continue Improvements in Information Technology

The IRS continues to focus on improving the technology infrastructure that supports its service and enforcement programs. Improved information technology capabilities will help make early detection and intervention efforts more effective, improve case selection, and allow the IRS to offer better, more user-friendly service to taxpayers.

Increasing E-File Rate

Electronic filing is a critical component of the effort to improve voluntary compliance and close the tax gap. By simplifying the filing process for taxpayers, decreasing processing errors, and expediting the processing and payment of tax refunds, electronic filing makes the tax-filing process less onerous for taxpayers and allows the IRS to update taxpayer records more efficiently.

Through sustained focus and outreach, the e-file rate has been steadily increasing for years. The 2008 e-file rate for individuals was 58 percent, up from 31 percent in 2001. Tax filing results thus far in 2009 already reflect a significant increase in this rate.

The Administration is committed to achieving an overall e-file rate of 80 percent. The IRS recent [sic] published an *in-depth research study* on ways to increase the e-file rate.[4] The study showed that approximately 85 percent of individual tax returns were filed by paid preparers, or by individuals via third-party software products. The study also showed that over 98 percent of paid preparer returns were completed using software, and yet a substantial number of tax returns are ultimately printed and mailed to the IRS. The Administration believes that in order to sustain progress toward the 80 percent goal, the Treasury should be authorized to require electronic filing from tax return preparers who file more than 100 tax returns in a calendar year. The President's FY 2010 budget includes the legislative proposal necessary to provide this authority.

Additionally, the IRS has been working on a modernized electronic filing (MeF) platform that provides real-time processing of tax returns and improves error detection. This new platform will improve detection of errors during the initial filing process, rather than after the fact, and will therefore reduce the number of filing errors that contribute to the tax gap. MeF is currently processing electronically filed tax returns for corporations, partnerships, excise tax filers, and exempt organizations. The number of tax returns filed through the MeF system increased 49 percent in 2008 to more than 3 million accepted returns, and volumes are projected to reach 4 million accepted returns for 2009. Starting in 2010, the IRS plans to roll out Form 1040 and its family of related schedules on the MeF platform, which will extend the benefits of the MeF platform to individual taxpayers as well.

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[4] "Advancing E-file Study Phase I Report: Achieving the 80% E-file Goal Requires Partnering with Stakeholders on New Approaches to Motivate Paper Filers," Internal Revenue Service, Department of the Treasury, September 30, 2008.

Core Taxpayer Account Database

The IRS has made significant progress in updating its core taxpayer account database, the Customer Account Data Engine. Moving away from its legacy technology, the IRS has devoted resources towards a new, relational database structure, which will enhance the flexibility, responsiveness, and timeliness of the IRS' service and enforcement functions. Nearly 40 million taxpayer accounts were processed using this modernized taxpayer account database in 2009. This new database is the most important element of the IRS' strategy for the next generation of taxpayer service and compliance applications that are needed to address the tax gap. The Administration's FY 2010 budget includes a program increase of $23 million to accelerate this important work.

Applying Enhanced Information Technology to Ongoing Operations

The IRS continues to deliver significant enhancements to the systems that support its core operations. For example, the Automated Underreporter (AUR) program, a mechanized system that helps to identify discrepancies in returns, sends notices to taxpayers when amounts reported on individual tax returns and amounts reported by third parties don't match. Improvements to the AUR program have enhanced workload selection and improved the overall productivity of the program. AUR case closures have increased from 2.0 million in 2004 to 3.5 million in 2008.

The expansion of the AUR program has allowed the IRS to increase coverage in key areas of non-compliance.

Status Update

The following provides a status update on the full range of information technology initiatives underway or completed since the release of previous tax gap reports:

Action Items	Status
Use technology to improve high income and non-EITC exam workload selection and method of delivery and assess the effectiveness of the exam treatment stream on selected non-filer cases	• Implemented new selection and classification criteria based on NRP results • Implemented automated case screening and selection process

Expand Automated Underreporter (AUR) program to include additional income types	• Expanded use of automatic notices
Evaluate the AUR matching process, and implement an improved case scoring and selection concept to select the most productive cases.	• Reengineered AUR matching process to improve coverage, maximize resource utilization, and increase AUR closures • Implemented improved workload selection tools
Expand the AUR Soft Notice Test, which involves asking taxpayers to voluntarily self-correct for future years	• Developed system requirements Performed test for approximately 30,000 taxpayers in FY2009 and expect to perform follow-up test of 30,000 additional taxpayers in FY2010
Develop enhancements to the Compliance Data Warehouse to improve workload identification and prioritization algorithms, allowing better evaluation of alternative treatment streams and ensuring Collection cases receive the most efficient and effective treatments	• Completed

Update the Collection inventory management system to improve functionality and navigation and provide capability to interface with other modernized systems	• Nationwide deployment in process
Automate lien delivery, recording, and release processes with state and local jurisdiction to improve the timeliness of lien filing, lien releases, and the payment of fees	• Not yet started (currently unfunded)
Test the use of statistical modeling techniques within TEGE to detect high-risk compliance patterns in order to use data to expand and improve examination selection	• In process
Develop and implement a set of compliance decision analytic tools that will support analysis of Tax Exempt and Government Entities (TE/GE) returns and other data to detect compliance trends and improve case and issue selection	• In process

Implement a new TE/GE electronic examination system (TREES) that will consolidate agent work papers to increase the accuracy and efficiency of the examination process	• Completed
Build and implement modernized e-file (MeF) receipt of electronic transmissions for additional tax forms	• Deployed Form 1120F replacement in January 2008 and Form 990 replacement in January 2009 • Developing first phase of the Form 1040 series for deployment in 2010

Component 4: Improve Compliance Activities

Multi-Year Investment in IRS Enforcement

The Administration's FY 2010 budget continues strong support of IRS enforcement, which will support a sustained focus in the areas of greatest risk. The budget request includes program increases of $332.2 million for investments in strong compliance programs, including a robust portfolio of international enforcement initiatives. The priorities include international enforcement, improving compliance programs dealing with businesses and high income individuals, expanding the use of document matching techniques to combat misreporting of income by business taxpayers, and improving collection operations, including the creation of two new Automated Collection System (ACS) sites.

The Administration's FY 2010 budget includes funding for an additional 15 tax specialists in Treasury's Office of Tax Policy. These new specialists will help to ensure that Treasury possesses capabilities sufficient to support rigorous analysis and implementation of revenue policy, including tax gap reduction.

The Administration's FY 2010 budget also outlines a multi-year investment to deal more effectively with the ever-increasing volume and complexity of international transactions. The initiative will add nearly 800 enforcement personnel to address the underreporting of tax associated with international transactions as well as domestic taxpayers involved with offshore activities.

The FY 2010 budget also contemplates a significant investment in enhancing and expanding the IRS' collection operation to address the tax gap attributable to underpayment of tax. From FY 2005 to FY 2008, the IRS achieved a 27.2 percent increase in collection efficiency, when over the same time period collection staffing decreased seven percent. The FY 2010 investment will allow the IRS to build on its efficiency gains, undertake pilot projects to further improve efficiency, and broaden overall collection coverage.

In total, the new enforcement personnel contemplated by the Administration's FY 2010 budget are estimated to generate $2.0 billion in additional annual enforcement revenue once the new hires reach full potential in FY 2012.

The IRS is constantly assessing the compliance landscape, and adapting and investing in its programs as needed to ensure an appropriate balance among its enforcement programs.

Status Update

Expanding on the new priorities and initiatives discussed above, the following chart provides a status update on the enforcement initiatives currently underway or completed since the release of prior tax gap reports:

Action Items	**Status**
Increase audit coverage and better target returns for examination	• Updated selection scores (DIF/ Discriminate Information Function) based on NRP results • Increased Schedule C audits • Updating selection criteria based on results of NRP (in process)

	• Improving correspondence exam case selection methodologies (in process) • Began significant compliance hiring initiative in FY09
Enhance the ability to identify and address tax schemes of business and individuals involving offshore activity, address illegitimate use of tax havens to shelter income, and increase information matching and examination activity for individuals living abroad	• Working with Congress to secure requested FY 2010 funds for nearly 800 new international enforcement personnel. Funding request of $128M to increase international enforcement efforts. • Engaging in voluntary disclosure initiative for taxpayers with undeclared offshore accounts • Completed pilot phase of the Broker Compliance Initiative Project • Developing additional compliance initiative projects in the areas of private banking and offshore merchant accounts (in process)

	• Issued regulations relating to transfer pricing, foreign tax credits, and foreign trusts (regulations relating to cross border restructuring in process) • Implemented the Shelter Data Management System (SDM), and implementation of the larger Selection and Workload Classification system is in process • Expanded the use of the OECD Abusive Transaction Database to identify emerging abusive transactions and issues
Enhance collection programs and increase the Federal Payment Levy Program (FPLP) using third-party data	• Working with Financial Management Service (FMS) and Centers for Medicare and Medicaid Services (CMS) to determine feasibility of adding Medicare payments

Work with other federal agencies regarding FPLP	• Expanded FPLP to include Defense Finance and Accounting Service salary payment files, Department of Defense Civilian Employees, HHS, EPA, and Department of Energy • Entered into agreements with DoD to add additional Federal wage and other payments
Improve compliance by tax preparers through implementation of the Service-wide Enforcement Preparers Strategy	• Announced IRS review of tax return preparers (recommendations to be made by end of 2009)
Improve collection selection criteria and filters for balance due and non-filer cases, including identifying and addressing potential high income non-filers	• Expanded the use of third-party information and research to enhance case selection • Refining decision analytics and developing new model to enhance case selection (in process) • Finalized Service-wide non-filer strategy

Litigate cases, work settlements, and design large scale resolution initiatives for tax shelter transactions to deter noncompliance	• Engaged in settlement initiatives including Son of Boss, LILO/SILO, Distressed Asset Trust (DAT), stock option transactions, and the overall Global Settlement Initiative • Litigated and continued to litigate unresolved cases
Initiate a project using Combined Annual Wage Reporting (CAWR) data to identify tax-exempt organizations that may not be properly reporting and paying employment tax	• Analyzed results and documented lessons for future CAWR initiatives
Increase criminal enforcement on abusive schemes, corporate fraud, employment tax, egregious non-filers, and Bank Secrecy Act violations	• Achieved average conviction rate over 90 percent for the combined component programs and publicity rates over 80 percent
Improve the alignment and allocation of Service-wide resources to identify, develop, and resolve challenges better in the global taxation arena	• Moved forward with significant international compliance initiatives (in process)

	• Used International Planning and Operations Council to identify opportunities to conduct cross-divisional exams and enhance cross-divisional identification and referral of emerging international compliance issues • Realigned international resources to improve integration and leverage expertise • Increased international examiner hiring (ongoing) • Developing processes to evaluate referrals and identify and assess international and U.S. possessions compliance issues
Improve tax administration to deal more effectively with increased emphasis on globalization by all corporate and individual taxpayers	• Moved forward with significant international compliance initiatives (in process) • Expanded information sharing through

	increased membership and broader focus in the Joint International Tax Shelter Information Centre (JITSIC) by adding Japan, adding a London office, and adding China and Korea as observers • Introduced new Form M-3 for Form 1120F to gather information on foreign corporations • Revised Form 5471 for international transactions (in process) • Providing education and guidance to withholding agents of their responsibilities to withhold on Fixed, Determinable, Annual, Periodical (FDAP) payments to non-U.S. persons (ongoing)
Address offshore and cross-border compliance risks through enforcement and by issuing published guidance	• Completed project on foreign athletes and entertainers to ensure appropriate reporting and sourcing of income

	• Completed voluntary settlement initiative for embassy/consular employees and continuing to pursue enforcement activities on non-electors • Issued regulations on transfer pricing, foreign tax credits, cross-border restructuring, and other cross-border issues

Component 5: Enhance Taxpayer Service

Providing quality taxpayer service is critical to protecting the approximately $2.7 trillion that U.S. taxpayers report and remit. The tax code is complex, and effective taxpayer assistance is necessary to help taxpayers understand and comply with their obligations.

Providing Innovative Online Services

The demand for online services continues to grow dramatically. In FY 2008, IRS.gov received 2.2 billion web page visits, an increase of 74 percent from FY 2005. From January 1 to May 31, 2009, 48 million taxpayers used the "Where's My Refund?" web site, up from 24 million for the same period in 2005.

In FY 2008, the IRS launched a hybrid online/in-person service with its Facilitated Self-Assistance Research Project. This project provides a kiosk with web access at IRS Taxpayer Assistance Centers. The kiosk computers allow taxpayers to help themselves and to get additional help from an IRS assistor if needed. Through FY 2009, the IRS has installed kiosk services in 50 Taxpayer Assistance Centers.

Streamline Written Communications with Taxpayers

In 2008, the IRS created a Taxpayer Communications Task Group to study and improve the clarity, accuracy, and effectiveness of written communications to taxpayers. Simple, clear communication makes it easier for taxpayers to comply with their obligations.

While the work of the group is ongoing, an early success was the elimination of nearly a dozen inserts in a notice informing businesses that they owe additional tax. This change to the CP 161 notice, which is mailed to business taxpayers who underpay their taxes, will halt the mailing of tens of millions of pieces of paper, reduce taxpayer and preparer burden, and save the government money.

Taxpayer Assistance Blueprint

The IRS continues to make progress in executing the initiatives outlined in its strategic plan for taxpayer service, the Taxpayer Assistance Blueprint (TAB). The TAB, which will be updated in the summer of

2009, outlines a series of initiatives aimed at enhancing IRS service options across all delivery channels: in person, on the Internet, and over the phone. The IRS has also embedded the philosophy and priorities of the TAB concept of improving service from the taxpayer perspective in every service improvement decision.

Status Update

The following chart provides an update on the status of the taxpayer service initiatives currently underway or completed since the release of prior tax gap reports:

Action Items	**Status**
Increase accuracy on toll-free telephone customer inquiries, processing functions, and paper adjustments	• Implementing and deploying Interactive Tax Law Assistant tool to provide accurate, efficient, and complete responses to basic tax law inquiries (in process) • Implementing and deploying Accessory Manager tools that provide standard research paths, consolidate account data, and automatically populate input fields (in process)

	• Implemented recommendations from the Correspondence Accuracy Improvement Study
Enhance IRS.gov	• Deployed interactive tax law decision support tool in FY 2009 filing season that includes enhanced FAQs • Preparing interactive probe and response capabilities (in process)
Improve the quality of volunteer-prepared returns through enhancements to the VITA program, including quality training and sample processing reviews	• Conducted on-site workshops to address quality concerns, and revised the volunteer return preparation training to use a process based training (PBT) approach for all volunteers. • Incorporating PBT concepts into online volunteer training application: Link & Learn Taxes (in process)
Enhance services to persons with limited English proficiency (LEP) through the Taxpayer Assistance	• Added enhancements including "Where's My Refund?", "How Much Was My

Blueprint, development of a Multi-Lingual Strategic Plan, development of a Virtual Translation Office, and launch of a revised version of the Spanish IRS.gov webpage	Economic Stimulus Payment?", and the Economic Stimulus Calculator to the Spanish IRS.gov • Undertook research efforts to pinpoint isolated community locations and identify actions to customize assistance • Performed targeted outreach for LEP taxpayers • Expanded Virtual Translation Office to provide tax forms, publications, and education materials in Spanish and other IRS-priority languages
Improve quality and timeliness of taxpayer contacts by maintaining an enhanced integrated quality assurance process with internal and external partners	• Developed and deployed Site Coordinator's Training, mandating use of intake and interview sheets and quality reviews for all return preparation. • Continued partner and employee feedback via roundtable

	discussions and partner satisfaction surveys • Implemented a Quality Statistical Sample Cadre to perform on-site return reviews that incorporates a second level review
Improve services through programs at both the national and local level by expanding collaborations with organizations serving the disabled, Native American communities, and pre-existing rural infrastructures	• Increased availability of free tax return preparation and financial/EITC education through a network of national and local partners in hard-to-serve Native American communities as well as for low income disabled persons • Working with Department of Agriculture and Rural Funding Foundations to increase availability of tax-related services in rural communities • Established measures to gauge national and local penetration rates for the rural initiative

	and shared best practices with rural partners
Expand and enhance the Spanish Website to increase electronic options, including options for Spanish language delivery of applications currently only in English	• Added "Where's My Refund?", "How Much Was My Economic Stimulus Payment?", and the Economic Stimulus Calculator to the Spanish website • Expanded and enhanced taxpayer education information including tax responsibilities and eligibility requirements for various credits and other benefits
Provide Reporting Agents with access to e-Services	• Deployed access to Electronic Account Resolution (EAR) and Transcript Delivery System (TDS) for Reporting Agents
Implement Taxpayer Assistance Blueprint Phase 2, which includes a five-year strategic plan for taxpayer service based on extensive research to understand taxpayer and stakeholder needs	• Embedded the TAB Guiding Principles within the FY 2009-2013 IRS Strategic Plan • Issuing in summer 2009 the second annual Report to Congress, which will

	include examples of numerous taxpayer service improvements accomplished in 2008 and 2009
Implement Internet-Customer Account Services (I-CAS) Release 1, which will enable taxpayer to view account information	• Working toward electronic access to account information, once all data security issues are resolved and the core taxpayer account database complete
Implement I-CAS Release 2, which will enable taxpayers to change their address, file an extension, submit a Power of Attorney, and calculate a payoff amount on balances due via a secure Internet link	• Status is same as above
Continue publicity efforts encouraging use of Online Payment Agreement (OPA)	• Issued new releases and other communications during filing seasons, including directions for accessing OPA from IRS.gov • Worked with tax software providers and other stakeholders to promote OPA

Enable taxpayers with disabilities to understand available tax credits and receive tax preparation assistance through partnerships with national and local organizations that serve this unique group of taxpayers	• Partnering with national and local organizations, including government entities, to increase return preparation services

Component 6: Reform and Simplify the Tax Law

Earlier this year, the President's Economic Recovery Advisory Board (PERAB) formed a Task Force on Tax Reform. The task force will, among other things, focus on tax simplification. The task force will report back to the board, and the full board is expected to report back to the President with options.

The following is a more detailed listing of specific action items that are underway by the IRS and Treasury to reform and simplify the tax law.

Initiatives	**Status**
Work with Congress to enact simplification legislative provisions	Enacted simplifications to create uniform definition of a child
Continue Taxpayer Burden Reduction projects	• Released revised Forms 1120S and 2553, along with related regulation changes, to simplify an S Corporation election

	• Released revised Form 94X, along with related regulation changes, to reduce employment tax reporting errors • Released new Form 8857 for innocent spouse relief
Continue tax form and publication improvements	• Among other improvements, developed a multi-year prioritized plan of burden reduction activities to include forms redesign and simplification, defined the MeF platform for XML-enabled PDF Form 1040, and launched a hyperlinked Publication 17, Your Federal Income Tax, on IRS.gov

Component 7: Coordinate with Partners and Stakeholders

Tax Return Preparer Review

The IRS recently announced that, by the end of 2009, the Commissioner will propose a comprehensive set of recommendations concerning tax return preparers. The review seeks to identify ways to improve taxpayer compliance and to ensure strong and uniform ethical standards of conduct for tax preparers.

Potential recommendations could focus on a new model for the regulation of tax return preparers, improved service and outreach for return preparers, education and training for return preparers, and enforcement related to return preparer misconduct.

The tax return preparer review will begin with a fact-finding effort targeted at a large and diverse constituent community, including both licensed tax preparers – such as enrolled agents, lawyers and accountants – and unlicensed tax preparers and software vendors. The effort will also seek input and dialogue with consumer groups and taxpayers.

Enhanced Collaboration with Partners and Stakeholders

The IRS has strengthened its partnerships with other state and Federal agencies. Strong collaboration enables the IRS and its partner agencies to make more efficient and effective use of existing resources. For example, the IRS has undertaken initiatives to make better use of information from state agencies, including state audit reports, and has developed a coordinated strategy to combat employment tax schemes.

Finally, the IRS has expanded its partnership with stakeholders to communicate more effectively with the numerous constituencies whose efforts might help raise the level of voluntary compliance. Examples include work with the Small Business Administration to educate new business owners on key tax topics, and expanded work with partners to communicate with military retirees on retirement-related tax issues.

Status Update

The following chart provides a status update on coordination efforts currently underway or completed since the release of prior tax gap studies:

Action Items	**Status**
Enhance the centralized process to maximize utilization of State Audit Reports (SARs) by IRS for federal assessments	• Established a system to establish baseline usability and productivity of incoming SARs • Continue to partner with states to implement enhancements (including automation of receipts) to improve usability of SARs
Implement a Questionable Employment Tax Practices (QETP) Initiative in partnership with the Department of Labor, National Association of State Workforce Agencies, Federation of Tax Administrators, and state	• Implemented initiative with initial 20 states participating, with 25 percent participation increases targeted and achieved in FY08 and FY09

workforce agencies to provide a collaborative national approach to combat employment tax schemes	• Incorporated data provided by the states into employment tax audit work streams
Further enhance the Fed/ Fed program by facilitating and expanding partnerships with other Federal agencies to improve tax administration	• Expanded partnerships to include the Social Security Administration (SSA) and the Small Business Administration (SBA)
Engage all 50 states through the State Reverse File Match Initiative (SRFMI) – a process that matches IRS extracts received through the Governmental Liaison Data Exchange Program against state master files to identify individuals and businesses who filed a state return but not a federal return and to identify differences in federal and state income reporting	• Engaged in 2008 pilot use of systemic SRFMI data received from 14 states, and increased state agency participation to 44 agencies in 2009 • Expansion in process
Determine tax administration benefits of utilizing state data warehouse concept	• Evaluating internal systems such as Compliance Data Warehouse and Integrated Production Model to determine feasibility

Develop an educational targeted outreach DVD for military personnel preparing for retirement	• Distributed and integrated DVD into all military pre-retirement seminars to ensure retirees understand tax rules applicable to their retirement benefits • Working with Department of Labor to include a topic on withholding taxes as a requirement for all military retiree training conducted on military bases and developing a Life Cycle Brochure on this topic for distribution
Enhance outreach efforts to industry audiences about available Audit Technique Guides and Tax Tips	• Determined what enhancements to current guides and what new guides are needed • Continued to publicize availability of guides via national and local liaison activities
Establish links to IRS.gov on industry, practitioner, educational, and governmental stakeholder websites	• Established Tax Centers (dedicated web space) with links to state and national organization websites

Develop and widely distribute educational fact sheets on areas of high noncompliance	• Distributed monthly fact sheets on wide variety of subject matters including avoiding incorrect self-employment deductions, wage compensation for S Corporation officers, and managing paper and electronic record-keeping requirements
Develop a strategy to reach practitioners without affiliation to a professional organization	• Developed grass-roots delivery channel with national retail tax preparation firms, expanded outreach to colleges and universities to include graduates entering tax field
Leverage key partners such as the SBA and its SCORE program and Small Business Development Centers (SBDCs) to deliver small business workshops to the new business community	• Continued contact with traditional partners to maximize leveraged opportunities that provide education and outreach directly to business owners • Partnered with SCORE and SBDCs to enhance quality and consistency of leveraged Small Business Tax Workshops

	• Partnered with SBA to increase outreach through the National Women's Business Council in order to promote voluntary compliance and share information customized for new business owners • Increased the number of Small Business Tax Workshops
Deliver educational messages through existing relationships with universities and colleges	• Expanding participation of current Historically Black Colleges and Universities (HBCUs) in the VITA program (in process) • Increasing participation of Beta Alpha Psi, national scholastic and professional fraternity, in VITA program by 10% (in process) • Expanding the Cooperative Extension Services Network tax prep and education program in each of the four regions, HBCUs, tribal colleges and universities (in process)

Develop audio educational messages for toll-free wait times	• Developed text and appropriate placement of specific educational messages • Deploying audio educational messages (expected July 2009)
Customize outreach to specific industries to encourage voluntary compliance	• Launched industry specific communication and outreach to small businesses, industry stakeholders, and state licensing agencies • Performing outreach in all states to promote use of IRS's web-based Tax Centers designed to provide education and web resources for specific industries and professions (in process) • Provided educational materials to new and existing business owners through partnerships with small business and industry stakeholders and state licensing agencies in all 50 states

Request feedback from internal and external stakeholders on existing outreach and educational programs to identify best practices and enhancements	• Convened IRS-wide task force to collect and review stakeholder feedback, shared recommendations with external stakeholders, and obtained additional feedback (implementation of recommendations ongoing)
Develop strategies to educate first-time business filers	• Implemented outreach strategy to first-time business filers including collaboration with small business and industry partners to develop an outreach campaign to educate first time Schedule C filers, including common errors to avoid
Expand relationships and collaboration with foreign tax administrations to increase informal and formal communications on international tax administration matters	• Completed OECD project relating to international guidelines on attribution of profits to permanent establishments • Participating in OECD work on monitoring Transfer Pricing Guidelines, including international

	business restructurings (ongoing) • Negotiated protocols to income tax treaties with Luxembourg and Switzerland to make the exchange of information provisions consistent with U.S. and OECD standards • Continuing efforts to conclude tax information exchange agreements, including agreements recently signed with Liechtenstein and Gibraltar • Participating in the Leeds Castle Group with the tax administration agencies of China, India, South Korea, the United Kingdom, Japan, Australia, Canada, France, and Germany (ongoing) • Collaborating via the Joint International Tax Shelter Information Centre (JITSIC) with Canada,

	Australia, and the United Kingdom to identify and curb abusive tax avoidance transactions (ongoing) • Participating with the OECD working group on Aggressive Tax Planning to design a database of various cross-border tax avoidance schemes (ongoing)

V. IRS Strategic Plan

Since the publication of the last tax gap report, the IRS published a new *strategic plan* for FY 2009-2013. The strategic plan outlines the service and enforcement goals of the IRS, along with the strategic foundations that underpin both. The plan recognizes that the IRS must excel at both service and enforcement: success is not an either/or proposition. The plan also outlines five long-term measures for evaluating the IRS's progress in achieving its goals, and which directly relate to the tax gap strategy. Those measures, some of which have been discussed above, include the following:

- Voluntary Compliance Rate. The Voluntary Compliance Rate, as explained earlier in this report, is highlighted in the strategic plan as a key long-term measure. The IRS's goal is to achieve an

86 percent voluntary compliance rate for Tax Year 2009, and is actively pursuing updates to the tax gap estimates that will allow progress against this goal to be measured.

- E-File Rate. The IRS has been tracking the rate of electronic filing for individual income tax returns since the inception of electronic filing in 1986, reporting the number of individual tax returns (Form 1040) that have been filed electronically in its published performance reports. The IRS is currently seeking to achieve an 80 percent e-file rate by 2012 for all major tax returns filed with the IRS.

- ACSI All Individual Taxpayer Score. The American Customer Satisfaction Index (ACSI) is a national indicator of customer satisfaction with the quality of products and services available to consumers in the United States. Each December, the ACSI issues a report on satisfaction of recipients of services from the Federal government. In 1999, the Federal government selected the ACSI to be a standard metric for measuring citizen satisfaction. Agency participation is voluntary but relatively extensive. Over 55 Federal government agencies have used the ACSI to measure citizen satisfaction of more than 110 services and programs. The IRS performance measure focuses on the satisfaction score associated with all individual income tax filers (paper and electronic filers). The IRS has a goal of achieving a satisfaction score of 72 for the 2012 tax year. As discussed above, a taxpayer-friendly tax filing process is essential to improving compliance.

- Nonrevenue Enforcement Activity. IRS has developed an index of enforcement activities that promote compliance yet do not focus primarily on tax revenue. IRS examines changes in this index in order to assess trends in its nonrevenue performance, which is similar to using the Consumer Price Index to assess trends in consumer prices. The nonrevenue enforcement activity index includes examination activity in the Tax Exempt and Government Entities Division as well as Bank Secrecy Act investigations.
- Employee Engagement. A motivated, well-trained, and dedicated workforce is critical to the ultimate success of all IRS initiatives. The IRS for several years has been conducting an annual employee survey to obtain feedback on a wide range of workplace issues. The results are used to calculate an engagement index, which is compared with engagement scores from prior years and from other agencies.

Recognizing the importance of a well-trained workforce to the accomplishment of the goals and metrics outlined in the strategic plan, the IRS last summer launched a Workforce of Tomorrow Task Force. The

Task Force's goal is to ensure that, five years from now, the IRS has a workforce equipped to serve America's taxpayers for the next fifteen years. The Task Force produced a roadmap of initiatives to address the IRS's greatest workforce challenges, which includes 58 recommendations that are currently being implemented. The IRS workforce is the foundation for the ultimate success of its efforts to implement its strategic plan and reduce the tax gap.

Conclusion

The tax gap imposes an unfair burden on law-abiding taxpayers, and the Department of the Treasury and the IRS are committed to narrowing the gap between what is owed and what is paid. This report has highlighted new initiatives to improve tax revenue collection, both through improved voluntary compliance and through effective enforcement. It has also provided status updates on a full range of initiatives currently underway or completed since the release of previous tax gap reports.

As outlined above, the plan to reduce the tax gap has multiple parts. Targeted changes in the tax laws, enhanced taxpayer service, and increased enforcement are all critical to this effort. As this report describes, progress has already been made with respect to key strategic priorities and initiatives, both those identified in prior tax gap reports and those developed since the issuance of the last report. In order to provide accurate and up-to-date assessments of progress, Treasury and IRS are deploying significant resources toward the long-term effort to produce regular, updated estimates of the tax gap, which will be used to assess progress toward closing the tax gap.

The Administration's FY 2010 budget proposes an expansive set of additional tools and requirements to reduce opportunities for evasion and other noncompliance. The Administration is committed to working closely with Congress to strike an appropriate balance to maximize revenue collection without imposing unreasonable compliance and enforcement burdens on the vast majority of individuals and businesses that fully and willingly pay what they owe.

APPENDIX: UNDERSTANDING THE TAX GAP[5]

The Internal Revenue Code places three primary obligations on taxpayers: (1) to file timely returns; (2) to make accurate reports on those returns; and (3) to pay the required tax voluntarily and timely. Taxpayers are compliant when they meet these obligations. Noncompliance – and the tax gap – results when taxpayers do not meet these obligations.

The tax gap is defined as the aggregate amount of true tax liability imposed by law for a given tax year that is not paid voluntarily and timely. True tax liability for any given taxpayer means the amount of tax that would be determined for the tax year in question if all relevant aspects of the tax law were correctly applied to all of the relevant facts of that taxpayer's situation. For a variety of reasons, this amount often differs from the amount of tax that a taxpayer reports on a return. The taxpayer might not understand the law, might make inadvertent mistakes, or might misreport intentionally.

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[5] This section is reproduced from "Reducing the Federal Tax Gap: A Report on Improving Voluntary Compliance," Internal Revenue Service, Department of the Treasury, August 2, 2007, pp. 6-9.

To be paid voluntarily, a tax liability must be paid without direct IRS intervention. Taxpayers have the responsibility to determine and report their correct tax liability, and to make sure that amount is paid (whether through withholding, estimated tax payments, payments with a filed return, etc.). The IRS focuses its enforcement where it is needed most, but the overall rate of tax compliance in the United States is as high as it is because the vast majority of taxpayers meet their obligations with little or no involvement from the IRS. To be paid timely, a tax liability must be paid in full on or before the date on which all payments for the given tax year were legally due.

It is important to emphasize that IRS estimates of the tax gap are associated with the legal sector of the economy only. Although tax is due on income from whatever source derived, legal or illegal, the tax attributable to income earned from illegal activities is extremely difficult to estimate. Moreover, the government's interest in pursuing this type of noncompliance is, ultimately, to stop the illegal activity, not merely to tax it.

Although they are related, the tax gap is not synonymous with the "underground economy." Definitions of the "underground economy" vary widely. However, most people characterize it in terms of the value of goods and services that elude official measurement. Furthermore, there are some items in the "underground economy" that are not included in the tax gap (such as tax due on illegal-source income), and there are contributors to the tax gap that no one would include in the "underground economy" (such as the tax associated with overstated exemptions, adjustments, deductions, or credits, or with claiming the wrong filing status). The greatest area of overlap between these two concepts is sometimes called the "cash economy," in which income (usually of a business nature) is received in cash, which helps to hide it from taxation.

Equally important, the tax gap does not arise solely from tax evasion or cheating. It includes a significant amount of noncompliance due to tax law complexity that results in errors of ignorance, confusion, and carelessness. This distinction is important even though, at this point, the IRS does not have sufficient data to distinguish clearly the amount of noncompliance that arises from willful, as opposed to unintentional, mistakes. Moreover, the line between intentional and unintentional mistakes is often a grey one, particularly in areas such as basis reporting, where a taxpayer may know that his or her reporting is inaccurate but does not have ready access to accurate information. This is an area where additional research is needed to improve understanding.

Measuring the Tax Gap

Historically, estimates of federal tax compliance were based on special studies, including the Taxpayer Compliance Measurement Program (TCMP), which covered income and self-employment taxes and groups of taxpayers, and consisted of line-by-line audits of random samples of returns. These studies provided the IRS with information on compliance trends and allowed the IRS to update audit selection formulas regularly. However, this method of data gathering was extremely burdensome on the taxpayers whose returns were selected. As a result of concerns raised by taxpayers, Congress, and other stakeholders, the last TCMP audits were done in 1988.

The IRS conducted several much narrower compliance studies between 1988 and 2001, but nothing that would provide a comprehensive perspective on the overall tax gap. Until recently, all of these subsequent estimates of the tax gap have been rough projections that basically assume no change in compliance rates among the major tax gap components even though the magnitude of these projections reflects growth in tax receipts in these major tax gap categories.

The NRP, which the IRS has used to estimate the most recent tax gap updates, arose out of a desire to find a less intrusive means of measuring tax compliance. The IRS used a focused statistical selection process that resulted in the selection of approximately 46,000 individual income tax returns for Tax Year (TY) 2001 – somewhat fewer than previous compliance studies, even though the population of individual tax returns had grown over time.

Like the compliance studies of the past, the NRP was designed to allow the IRS to meet certain objectives – to estimate the overall extent of reporting compliance among individual income tax filers and to update the audit-selection formulas. It also introduced several innovations designed to reduce the burden imposed on taxpayers whose returns were selected for the study.

The first NRP innovation was to compile a comprehensive set of data to supplement what was reported on the selected returns. The sources of the "case building" data included third-party information returns from payers of income (e.g., Form W-2 and Form 1099) and prior-year returns filed by taxpayers. Also, for the first time, the IRS added data on dependents obtained from various government sources, as well as data obtained from public records (e.g., current and prior addresses, real estate holdings, business registrations, and involvement with corporations). Together, these data reduced the amount of information requested from taxpayers, with some of the selected taxpayers not requiring any contact from the IRS. In effect, these data allowed the IRS to focus its efforts on return information that could not otherwise be verified. This pioneering approach was so successful it is being expanded in regular operational audit programs.

A second major NRP innovation was to introduce a "classification" process, whereby the randomly selected returns and associated case-building data were first reviewed by experienced auditors (referred to as classifiers) who identified not only which issues needed to be examined, but also the best way to handle each return in the sample. In this way, each return was either: (1) accepted as filed, without contacting the taxpayer at all (although, sometimes, minor adjustments were noted for research purposes); (2) selected for correspondence audit of up to three focused issues; or (3) selected for an in-person audit where there were numerous items that needed to be verified. In addition, the classifiers identified compliance issues that the auditor was required to evaluate, although the examiners had the ability to expand the audit to investigate other issues as warranted.

Other NRP innovations included streamlining the collection of data, providing auditors with new tools to detect noncompliance, and involving stakeholders (including representatives of tax professional associations) in the design and implementation of the study. Clearly, the NRP approach was much less burdensome on taxpayers than the old TCMP audits, which examined every line item on every return.

Tax Gap Estimates

As noted above, for the 2001 tax year, the overall gross tax gap was estimated to be approximately $345 billion, corresponding to a noncompliance rate of 16.3 percent. After accounting for enforcement efforts and late payments, the amount was reduced to $290 billion, corresponding to a net noncompliance rate of 13.7 percent.

Noncompliance takes three forms:

- Not filing required returns on time (nonfiling);
- Not reporting one's full tax liability on a timely filed return (underreporting); and,
- Not timely paying the full amount of tax reported on a timely return (underpayment).

The IRS has separate tax gap estimates for each of these three types of noncompliance. Underreporting (in the form of unreported receipts and overstated expenses) constitutes over 82 percent of the gross tax gap, up slightly from earlier estimates. Underpayment constitutes nearly 10 percent and nonfiling almost 8 percent of the gross tax gap.

Nonfiling

The nonfiling gap is defined as the amount of true tax liability that is not paid on time by taxpayers who do not file a required return on time (or at all). It is reduced by amounts paid on time, such as through withholding, estimated payments, and other credits. The nonfiler population does not include legitimate nonfilers (i.e., those who have no obligation to file).

Underreporting

The underreporting gap is defined as the amount of tax liability not voluntarily reported by taxpayers who file required returns on time. For income taxes, the underreporting gap arises from three errors: underreporting taxable income, overstating offsets to income or to tax, and net math errors. Taxable income includes such items as wages and salaries, rents and royalties, and net business income. Offsets to income include income exclusions, exemptions, statutory adjustments, and deductions. Offsets to tax are tax credits. Net math errors involve arithmetic mistakes or transcription errors made by taxpayers that are corrected at the time the return is processed. In addition to developing an estimate of the aggregate underreporting gap, it is possible to break aspects of this estimate down into measures of the underreporting gap attributable to specific line items on the tax return.

Underpayment

The underpayment gap is the portion of the total tax liability that taxpayers report on their timely filed returns but do not pay on time. This arises primarily from insufficient remittances from taxpayers themselves. However, it also includes employer under-deposits of withheld income tax. In the case of withheld income tax, it is the responsibility of the employees to report the corresponding tax liability on timely filed returns, and it is the responsibility of their employers to deposit those withholdings with the government on time.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 10-cv-01546-REB-CBS

The Direct Marketing Association,

Plaintiff,

v.

Roxy Huber, in her capacity as Executive Director, Colorado Department of Revenue,

Defendant.

DECLARATION OF TODD SALIMAN

(Filed May 6, 2011)

I, Todd Saliman, pursuant to 28 U.S.C. § 1746 do depose and state as follows:

1. I have been the Director of the Governor's Office of State Planning and Budgeting since December 31, 2006. In that capacity I am familiar with the budget for the State of Colorado, including General Fund revenue forecasts and the budget implications for these forecasts.

2. The Colorado state budget situation is currently quite challenging. Since FY 2008-09 we have balanced shortfalls totaling $5.2 billion. Included in this amount is a $1.5 billion shortfall that has been balanced in the current fiscal year. That means that if not for the expenditure reductions, revenue increases and reserve reductions in the current fiscal year, our budget would be $1.5 billion out of balance.

3. Also included in the $5.2 billion is a $714 million shortfall that is being balanced in the Governor's FY 2011-12 budget request. That $714 million shortfall does not include nearly $380 million of increases that would have been requested in a traditional year.

4. The Governor's budget request is $458 million short of funding K-12 education at the level that would be needed if the historical interpretation of Amendment 23 was in effect. The budget also includes an effective 21% reduction in state support for higher education. From FY 2007-08 to FY 2011-12 the state's General Fund budget has grown by 1.7%. Historically, General Fund spending often increased by 6% per year.

5. The budget shortfalls indicate that state revenues are simply inadequate to pay for the day to day functions of state government. Because revenues are not adequate, expenditures have been reduced and efforts to increase revenues have been implemented. Because we are constitutionally required to balance the budget, any reduction in revenues will directly result, on a dollar-for-dollar basis, in the need to either implement additional expenditure reductions or identify additional revenue sources.

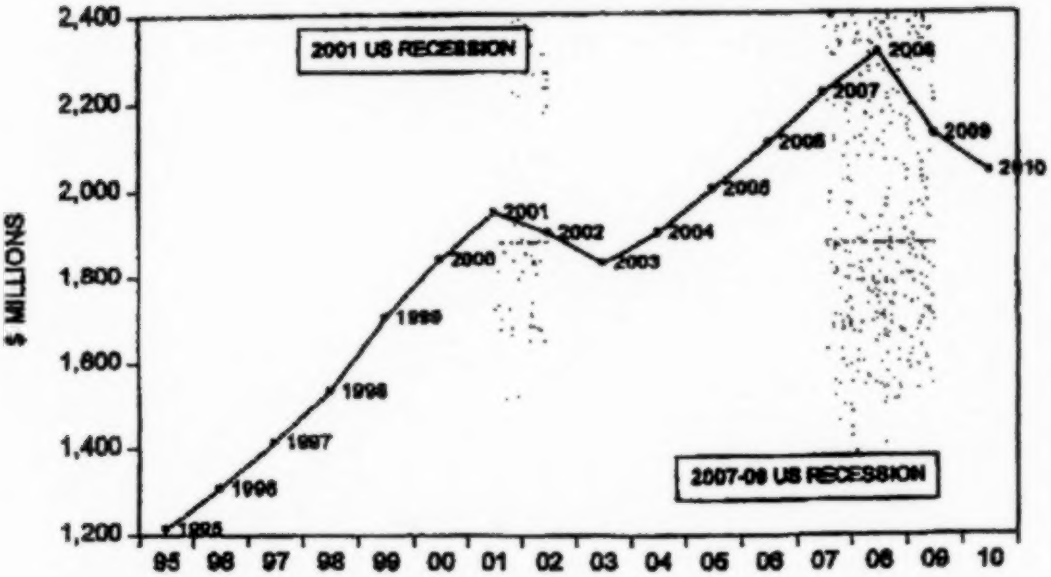
6. The economic forecast indicates that economic growth in Colorado will continue to be very modest. The rate of revenue growth throughout the life of the forecast will not be adequate to pay for mandated and historical increases in areas like Medicaid, K-12 and

higher education. In fact, it is likely that during each of the forecast years it will be necessary to balance additional budget shortfalls.

7. The September Revenue Forecast projects that FY 2010-11 excise tax collections will total $2.2 billion ($2.15 billion of which is expected to come from sales and use tax) and income tax revenues will total $4.6 billion. These two tax sources are the primary funding sources for the state's General Fund. If either of these sources declines, then additional expenditure reductions or revenue increases must be identified.

8. Sales and use tax collections historically account for approximately one third of the State's General Fund. The forecast indicates that 2010 sales tax revenues are going to come in just over the level that was collected in 2005 (see graph below). This comes at a time when the demand for state services is growing rapidly, Medicaid enrollments are up as is enrollment in K-12 education and higher education. As is always the case during a recession, demand for state services runs counter cyclical to the economy. When the economy turns down the demand for services goes up.

SALES AND USE TAX REVENUE



9. In conclusion, the global economic downturn did not spare Colorado. Weak state revenues have resulted in the need to make dramatic reductions to state programs. The recession has also driven the need to not only increase General Fund revenues through statutorily and constitutionally allowable means but to work to ensure that revenues owed to the state are indeed collected.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 18th day of November 2010.

/s/ Todd Saliman
Todd Saliman

HB10-1193

Colorado Legislative Council Staff Fiscal Note

FINAL
FISCAL NOTE

(Filed May 27, 2011)

Drafting Number: LLS 10-0739

Prime Sponsor(s): Rep. Pommer
Sen. Heath

Date: August 18, 2010

Bill Status: Signed into Law

Fiscal Analyst: Fiona Sigalla (303-866-3556)

TITLE: CONCERNING THE COLLECTION OF SALES AND USE TAXES ON SALES MADE BY OUT-OF-STATE RETAILERS, AND MAKING AN APPROPRIATION THEREFOR.

Fiscal Impact Summary	**FY 2009-2010**	**FY 2010-2011**	**FY 2011-2012**
State Revenue General Fund	$20,000	$200,000	$12.5 million
State Expenditures General Fund		$161,584	$85,959
FTE Position Change		1.0	1.0

Effective Date: The bill was signed by the Governor on February 24, 2010. Effective for sales occurring on or after March 1, 2010.

Appropriation Summary for FY 2010-2011: See the State Appropriations section.
Local Government Impact: Undetermined revenue gain.

Summary of Legislation

This bill clarifies the sales and use tax responsibilities of retailers that are not currently collecting sales tax and increases the Department of Revenue's enforcement power with regards to collecting these taxes. There are two sections of the bill.

The first section affects out-of-state retailers that are part of a "controlled group of corporations", which is an IRS designation that defines firms that are legally related to each other. Retailers must collect and remit state and local sales tax from Colorado residents if they are part of a controlled group that has a retailer with a physical presence in the state, and that retailer engages in constitutionally sufficient solicitation in Colorado.

The second section of the bill affects retailers that do not collect Colorado sales tax. These retailers must notify Colorado purchasers that the State of Colorado requires the purchaser to file a use tax return if sales tax has not been paid on taxable purchases. The retailer is also required to send notification to all Colorado purchasers by January 31 of each year showing the total amount paid by the purchaser from the retailer in the previous calendar year. This information must also be filed annually with the Department of Revenue. Retailers will be fined $5 per customer for failing to provide notice of the tax requirement to customers, and $10 per customer for failing to provide notice of the annual sales amount to the Department of Revenue.

The Executive Director of the Department of Revenue is given subpoena power to enforce the provisions of this bill.

The Department of Revenue is required to account for the revenue attributable to this bill, and make quarterly reports to the legislature about the revenue gain to the extent information is available. The bill directs that no new revenue be used to fund additional state FTE, except for any state employees necessary to enforce the provisions of HB 10-1193.

Background

Colorado residents have always been required to remit sales or use tax on taxable purchases from out-of-state firms. Customers must declare tax obligations and remit payment voluntarily if retailers do not collect sales tax. House Bill 10-1193 creates mechanisms to improve sales and use tax compliance from purchasers who use out-of-state retailers or retailers who do not otherwise collect sales tax.

State Revenue

General Fund revenue will increase by an estimated $20,000 in FY 2009-10, $200,000 in FY 2010-11, and $12.5 million in FY 2011-12. The revenue expected in FY 2009-10 and FY 2010-11 is mostly the result of tax collected from the first section of the bill, related to retailers who are a part of a group of controlled corporations. Revenue generated in FY 2011-12 and beyond is largely driven by estimated consumers use tax collections from the second section of the bill. The revenue estimate for FY 2009-10 represents a partial-year impact from tax incurred between March 1, 2010, and June 31, 2010. Expectations for tax collections in FY 2011-12 will be lower than in later years because awareness of the law and enforcement compliance are expected to be phased in over a few years.

Colorado is expected to collect about 60 percent of uncollected state sales and use tax obligations from out-of-state retailers as a result of the improved enforcement provisions in House Bill 10-1193. This reduced collection rate is due, in part, to a de minimis requirement in the regulation that exempts retailers making less than $100,000 in total gross sales in Colorado.

The estimate for total uncollected sales and use tax is based on a report by Donald Bruce, William F.

Fox, and LeAnn Luna of the University of Tennessee.[1] The state's share of sales tax collections are 43.3 percent of total taxes based on state and local sales tax collections from 2007 Census of Government Finance, U.S. Census Bureau. Taxes attributable to Business-to-Consumer transactions is estimated at 49 percent.

State Expenditures

The bill increases state General Fund expenditures in the Department of Revenue (DOR) by an estimated **$161,584 and 1.0 FTE in FY 2010-11** and **$85,959 and 1.0 FTE in FY 2011-12**. These costs are shown in Table 1 and described below.

Table 1. Expenditures Under HB10-1193

Cost Components	**FY 2010-11**	**FY 2011-12**
Personal Services	$91,584	$65,959
FTE	1.0	1.0
Legal Services	40,000	20,000
Online Tax Payment System	30,000	–
TOTAL	**$161,584**	**$85,959**

The DOR will need additional staff support to seek out and investigate online retailers, send letters, respond to calls, and build a database to track information. This workload is expected to require 0.5 FTE per year. House Bill 10-1193 provides DOR an additional 0.5 FTE for policy and legal research to respond to potential legal actions by online retailers, as well as temporary staff to answer questions from taxpayers for the first 2 years. An online tax payment system will be developed to make it easier for consumers to pay the taxes owed for online purchases. This system will be developed by the State Internet Portal Authority under contract with the DOR for $30,000 in FY 2010-11.

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[1] "State and Local Government Sales Tax Revenue Losses from Electronic Commerce" by Donald Bruce, William F. Fox, and LeAnn Luna. The University of Tennessee, April 13, 2009.

Legal assistance from the Department of Law was expected to cost $40,000 in FY 2010-11 and $20,000 in FY 2011-12, and these dollars were appropriated. However, on June 30, 2010, the Direct Marketing Association filed a complaint for declaratory and injunctive relief against the Executive Director of the DOR in the United States District Court. As a result of this litigation, the DOR anticipates pursuing a supplemental for additional funding.

Local Government Impact

This bill will result in an undetermined increase in revenue for local government entities because online retailers will collect local sales tax in addition to state sales tax.

State Appropriations

In FY 2010-11, the Department of Revenue requires an appropriation of $161,584 and 1.0 FTE. Of that amount, $40,000 should be reappropriated to the Department of Law. As enacted, the bill includes these appropriations.

Departments Contacted

Revenue Law

PETITIONER'S BRIEF

No. 13-1032

In The
Supreme Court of the United States

◆

DIRECT MARKETING ASSOCIATION,

Petitioner,

v.

BARBARA BROHL,
IN HER CAPACITY AS EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF REVENUE,

Respondent.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit**

◆

BRIEF FOR PETITIONER

◆

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September 9, 2014

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QUESTION PRESENTED

The Tax Injunction Act, 28 U.S.C. § 1341 ("TIA"), provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The Tenth Circuit Court of Appeals held that the TIA precludes the exercise of federal court jurisdiction over a suit brought by the Petitioner challenging the constitutionality of a Colorado law which imposes notice and reporting requirements, and substantial penalties for non-compliance, on out-of-state retailers that do not collect Colorado sales tax. The question presented is:

Whether the TIA bars federal court jurisdiction over a suit brought by non-taxpayers to enjoin the informational notice and reporting requirements of a state law that neither imposes a tax, nor requires the collection of a tax, but serves only as a secondary aspect of state tax administration.

PARTIES TO THE PROCEEDING

Petitioner Direct Marketing Association was the plaintiff and appellee in the proceedings below. Respondent Barbara Brohl, the appellant below, is the Executive Director of the Colorado Department of Revenue. The defendant in the District Court proceedings was the former Executive Director, Roxy Huber. Ms. Brohl was substituted for Ms. Huber for purposes of the appeal before the Tenth Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Direct Marketing Association ("DMA") states the following:

Direct Marketing Association is a not-for-profit corporation, and, as such, has no parent corporation and has issued no stock held by any publicly-traded corporation.

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INTRODUCTION

The DMA's suit challenging the constitutionality of Colo. Rev. Stat. §§ 39-21-112(3.5)(c)&(d) ("the Colorado Act") does not seek to "enjoin, suspend or restrain the assessment, levy or collection" of any state tax. The Colorado Act does not impose a tax, or a tax collection obligation, upon out-of-state retailers. Nor does the DMA contest the use tax obligations of the Colorado businesses and consumers who purchase products from out-of-state retailers subject to the Colorado Act. The DMA's suit does not call into question the validity of the Colorado use tax, or the authority of the Executive Director of the Colorado Department of Revenue ("Department") to assess the use tax against Colorado purchasers. Moreover, the DMA does not seek to prevent the Department from pursuing collection of the tax from Colorado taxpayers.

Rather, the DMA contests the imposition of a set of informational notice and reporting obligations upon its affected members, a group of non-taxpayers located outside of Colorado, on whom Colorado sales and use tax obligations are not (and may not be, consistent with *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)) imposed under Colorado law. Indeed, as the Tenth Circuit acknowledged, the obligations of the Colorado law are expressly *not* tax obligations, but are imposed *in lieu of* the sales and use tax obligations to which the targeted group of out-of-state retailers are not subject. *See* Appendix to Petition for a Writ of Certiorari ("Pet.App.") at A-26. The purpose of the DMA's challenge is, therefore, not to "enjoin, suspend or restrain the assessment, levy or collection" of Colorado use taxes, but rather to prevent the imposition of discriminatory and burdensome regulatory obligations upon an affected segment of its membership.

Despite the non-tax nature of the DMA's challenge, the Tenth Circuit held that the suit could not be brought in federal court because of the TIA. According to the Tenth Circuit, the TIA's jurisdictional bar extends to any suit that "would enjoin a procedure required by the state's taxing statutes and regulations that *aims to enforce and increase* tax collection." Pet.App. at A-19 (italics added). No other court decision has sought to extend the jurisdictional bar of the TIA this far. The Tenth Circuit's ruling, if allowed to stand, would preclude federal courts from exercising jurisdiction over any suit challenging a regulatory provision that the state claims, no matter how indirectly or speculatively, is intended to promote or facilitate the voluntary payment of taxes. Neither the language nor the purpose of the TIA supports such an expansive interpretation.

◆

OPINIONS BELOW

The opinion of the Tenth Circuit (Pet.App. at A-1 – A-33) is reported at 735 F.3d 904. The Tenth Circuit's order denying rehearing (Pet.App. D-1 – D-2) is not reported. The order of the United States District

Court for the District of Colorado granting the DMA's motion for summary judgment and entering a permanent injunction (Pet.App. B-1 – B-25) is not reported. The order of the District Court granting a preliminary injunction (Pet.App. C-1 – C-17) is not reported.

◆

JURISDICTION

The DMA's petition for a writ of certiorari to the Tenth Circuit was granted on July 1, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

◆

STATUTORY PROVISIONS INVOLVED

The TIA provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The relevant provisions of the Colorado Revised Statutes are reproduced at Pet.App. E-1 – E-4.

◆

STATEMENT

A. Statutory and Regulatory Background

1. Enacted by Congress in 1937, the TIA was "one of several statutes reflecting congressional

hostility to federal injunctions issued against state officials in the aftermath" of the Court's decision in *Ex Parte Young*, 209 U.S. 123 (1908) (holding that state officials were subject to suit in federal court for constitutional violations notwithstanding the Eleventh Amendment). *See Rosewell v. LaSalle Nat. Bank*, 450 U.S. 503, 522 n.28 (1981) (discussing enactment of the TIA). The TIA was an amendment to the grant of jurisdiction to the federal district courts set forth in the Judicial Code, 28 U.S.C. § 41(1) (1937), which provided, in pertinent part:

> The District Court shall have original jurisdiction [o]f all suits of a civil nature at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens or subjects. *Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.*

See H.R. Rep. 1504, 75th Cong., 1st Sess., at 4 (1937) (italics in original) (set forth in the Appendix to Petitioner's Brief ("Br.App.") at 26-28). The TIA was re-codified in 1948 at 28 U.S.C. § 1341.

Three similar statutes based on like principles had already been enacted by the Congress at the time the TIA became law. *See* 81 Cong. Rec. at 1415-16 (Feb. 19, 1937) (Br.App. at 3-4). The earliest of the related statutes, the so called Anti-Injunction Act ("AIA"), was enacted in 1867 as part of the internal revenue code. Act of Mar. 2, 1867, ch. 169, § 10, 14 Stat. 475; *Snyder v. Marks*, 109 U.S. 189, 191-92 (1883) (explaining circumstances of AIA's enactment). As now codified at 26 U.S.C. § 7421(a), the AIA provides in pertinent part that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." The AIA limits federal and state court jurisdiction over suits challenging federal taxes. The operative language of the AIA has remained essentially unchanged throughout its history. *Bob Jones Univ. v. Simon,* 416 U.S. 725, 731 n.6 (1974).

The language of the AIA, while serving a purpose similar to the TIA, *see Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 6-7 and n.6 (1962), differs from the TIA in certain key respects. The AIA bars jurisdiction over any suit "for the purpose of restraining any tax" under the federal tax code. 26 U.S.C. § 7421(a). The TIA, in contrast, is more targeted and precludes the exercise of federal court jurisdiction "to enjoin, suspend or restrain" three specific functions performed by state tax officials, *i.e.*, "the assessment, levy or collection" of any state tax. 28 U.S.C. § 1341. The TIA thus more precisely defines and limits the scope of its jurisdictional bar.

The Butler Act was enacted in 1927 as a restriction on jurisdiction over suits challenging Puerto Rico taxes. Act of Mar. 4, 1927, 44 Stat. 1421 (now codified at 48 U.S.C. § 872). Under the Butler Act, "[n]o suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the United States District Court for the District of Puerto Rico."

The Johnson Act was an earlier amendment to the Judicial Code enacted shortly before the TIA in 1934, and became the statute upon which the TIA was "modeled." *Rosewell*, 450 U.S. at 513-14. The Johnson Act originally precluded federal jurisdiction over any suit "to enjoin, suspend or restrain" the "enforcement, operation, or execution of," or any action taken "in compliance with," orders of state and local public utility commissions affecting rates. *See* Br.App. at 27-28. It now precludes interference with the "operation of, or compliance with" such orders. *See* 28 U.S.C. § 1342.

The meaning of each of these jurisdiction-limiting statutes is best understood in light of the language, interpretation and application of the others. *See Hibbs v. Winn*, 542 U.S. 88, 102-05 (2004) (explaining the influence of the AIA on the TIA); *Williams Packing*, 370 U.S. at 6-7 and n.6 (interpreting the AIA in light of the TIA); *Rosewell*, 450 U.S. at 513-14 (TIA modeled in part on the Johnson Act); *United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323, 330-31 and n.11 (1st Cir. 2003) (*"UPS"*) (interpreting the Butler Act consistent with the TIA).

In accordance with the purpose of the TIA, its "broad prophylactic language" has been consistently interpreted to foreclose federal court equity jurisdiction over suits by taxpayers seeking to circumvent available state procedures (most notably, refund actions) for determining their liability for state taxes. *See Rosewell*, 450 U.S. at 523-24. The TIA, however, is not an absolute prohibition on federal court review of "all aspects of state tax administration." *Hibbs*, 542 U.S. at 104-05 (discussing history of TIA). In suits not presenting claims by taxpayers attempting to prevent the imposition of state taxes, courts have properly defined the limits of the Act's jurisdictional bar.

Thus, for example, lower courts have held that the TIA does not preclude federal court jurisdiction over a suit challenging a law that conditions state licensure on the payment of state taxes (*e.g., Wells v. Malloy*, 510 F.2d 74, 77 (2d Cir. 1975)), or that imposes restrictions on passing through the cost of state taxes to customers of a taxpayer (*Mobil Oil Corp. v. Tully*, 639 F.2d 912, 918 (2d Cir.), *cert. denied sub nom. Tully v. New England Petroleum Corp.*, 452 U.S. 967 (1981)). Similarly, the First Circuit has ruled that the Butler Act does not exclude from federal district court a suit contesting third-party reporting obligations imposed on a common carrier delivering goods purchased from outside of the jurisdiction by Puerto Rico consumers, even though the measures were intended to promote the payment of Puerto Rico excise taxes. *UPS*, 318 F.3d at 331. Most recently, the AIA has been held not to preclude a challenge by financial institutions to federal regulations requiring the reporting of interest earned by foreign citizens on U.S. bank accounts, even though the IRS asserted that such information would enhance U.S. tax compliance. *Florida Bankers Ass'n v. United States Dep't of Treasury*, 2014 WL 114519 at *6-*7, ___ F.Supp.2d ___ (D.D.C. Jan. 13, 2014).

2. Enacted by the Colorado General Assembly in February 2010, the provisions of the Colorado Act impose notice and reporting obligations on "each retailer that does not collect Colorado sales tax." Colo. Rev. Stat. §§ 39-21-112(3.5)(c)(I), (d)(I)(A), (d)(II)(A). The Colorado Act is intended to apply solely to retailers who are protected from the imposition of Colorado sales and use tax collection obligations under *Quill*, *i.e.*, "non-collecting" retailers located outside the state.

In June 2010, the Department adopted regulations to implement the Colorado Act. 1 Colo. Code Regs. § 201-1:39-21-112.3.5 (2010) ("the Regulations"). The Colorado Act and Regulations establish three separate obligations for non-collecting retailers:

a. The Transactional Notice

In connection with each sale to a "Colorado purchaser," an affected retailer is required to notify the purchaser that although the retailer does not collect Colorado sales tax, the purchaser is obligated to self-report Colorado use tax (referred to by the parties as the "Transactional Notice"). Colo. Rev. Stat. § 39-21-112(3.5)(c)(I); 1 Colo. Code Regs. § 201-1:39-21-112.3.5(2)(a). A "Colorado purchaser" includes not only a Colorado resident, but also any purchaser located outside of Colorado who requests that products be delivered to a recipient in Colorado. 1 Colo. Code Regs. § 201-1:39-21-112.3.5(1)(b). The Regulations set forth detailed requirements with respect to the content, placement and timing of the Transactional Notice. *Id.* §§ 201-1:39-21-112.3.5(2)(a)-(e).

b. The Annual Purchase Summary

A non-collecting retailer must provide certain Colorado purchasers annually, by First Class Mail, a detailed listing of their purchases, while also informing the customer that the purchaser is obligated to report use tax on such purchases (the "Annual Purchase Summary"). Colo. Rev. Stat. §§ 39-21-112(3.5)(d)(I)(A)&(B); 1 Colo. Code Regs. §§ 201-1:39-21-112.3.5(3)(a)&(b). The Regulations contain provisions concerning the content, placement, and delivery of the Annual Purchase Summary. 1 Colo. Code Regs. §§ 201-1:39-21-112.3.5(3)(a)(i)-(vii). A retailer may, if it complies with certain requirements, elect to send such Annual Purchase Summaries only to those Colorado purchasers whose total Colorado purchases are more than $500 for the prior calendar year. *Id.* § 201-1:39-21-112.3.5(3)(c).

c. The Customer Information Report

Any retailer that is required to mail at least one Annual Purchase Summary to any Colorado purchaser for a calendar year must also file an annual report with the Department containing the name, billing address, all shipping addresses, and the total amount of purchases of each of its Colorado purchasers, without regard to the dollar amount of their purchases (the "Customer Information Report"). *See* Colo. Rev. Stat. § 39-21-112(3.5)(d)(II)(A); 1 Colo. Code Regs. § 201-1:39-21-112.3.5(4). The Regulations provide detailed requirements for the content and format of the Customer Information Report. 1 Colo. Code Regs. §§ 201-1:39-21-112.3.5(4)(a)-(c). No other state has adopted a similar requirement.

Failure to comply with the notice and reporting requirements of the Colorado Act and Regulations exposes a non-collecting retailer to substantial penalties. *See* Colo. Rev. Stat. §§ 39-21-112(3.5)(c)(II), (d)(III); 1 Colo. Code Regs. §§ 201-1:39-21-112.3.5(2)(f) ($5 penalty per Colorado sale as to which no Transactional Notice is given), (3)(d) ($10 penalty per Annual Purchase Summary not mailed), (4)(f) ($10 penalty per name not included on a Customer Information Report).

An expert retained by the Executive Director projected that the Colorado law would apply to as many as 10,000 retailers nationwide. *See* C.A. App. at 1702, 3158-60.

The Colorado Act does not, however, apply to in-state, Colorado retailers. Indeed, because retailers doing business in Colorado are required, under Colorado law, to collect the sales tax from the purchaser at the time of the sale, the Colorado Act necessarily excludes in-state retailers from its requirements. *See* Colo. Rev. Stat. §§ 39-26-103(1)(a), 39-26-106(2)(a).

B. Procedural Background

1. The Direct Marketing Association, is a not-for-profit corporation with headquarters in New York. C.A. App. at 48 (*First Amended Complaint ("Compl.")* ¶ 2). The DMA is the leading trade association of businesses and organizations using and supporting multichannel marketing methods, with members from all fifty states and numerous foreign countries. *Id.* Members of the DMA market their products directly to consumers via catalogs, print advertisements, broadcast media, and the Internet. *Id.*

Many DMA members have no store, property, employees or other physical presence in Colorado. C.A. App. at 52. As a result, these non-Colorado retailers are not obligated under state law to collect Colorado sales or use taxes on retail sales to Colorado consumers and, moreover, are protected against the imposition of a sales/use tax collection obligation under *Quill*. Many DMA members with no physical presence in Colorado do not collect Colorado sales tax. *Id.* The Colorado Act targets these DMA members and other out-of-state, non-collecting retailers with the obligations of the Transactional Notice, Annual Purchase Summary and Customer Information Report.

2. The DMA in June 2010 filed a Complaint (amended in July 2010) in the federal District Court for the District of Colorado challenging the constitutionality of the Colorado Act and Regulations. *See* J.A. at 2 (Dckt. 10). Jurisdiction in the District Court was based on 28 U.S.C. § 1331. The DMA alleged multiple constitutional violations resulting from the Colorado Act, including claims under the Commerce Clause, the First Amendment, the right of privacy of Colorado consumers, and the Takings Clause.

In August 2010, the DMA moved for a preliminary injunction against the law's enforcement based on its Commerce Clause claims. J.A. at 2 (Dckt. 15). At the same time, the Executive Director filed a motion to dismiss the DMA's non-Commerce Clause claims. *Id.* (Dckt. 14). The Executive Director's motion, which was predicated largely on her contention the DMA lacked standing to pursue its non-Commerce Clause claims, made no mention of the TIA. *Id.*; *see* C.A. App. at 3204-40.

On January 26, 2011, the District Court granted the DMA's motion. Pet.App. C-1 – C-17. The Court enjoined the Executive Director from enforcing the Colorado Act and Regulations, pending further order by the Court. *See id.* at C-15 – C-17.

In March 2011, the parties agreed to file cross-motions for summary judgment on the DMA's

Commerce Clause claims, with a stay of proceedings on all remaining claims. J.A. at 11 (Dckt. 91). In May 2011, the parties filed their respective motions for summary judgment. *Id.* at 12 (Dckt. 98, 99).

In March 2012, the District Court granted summary judgment in favor of the DMA on both of its Commerce Clause claims and entered a permanent injunction enjoining enforcement of the Colorado Act and Regulations. *See* App. B-1 – B-25.

3. The Executive Director appealed the entry of the permanent injunction on the merits. J.A. at 14 (Dckt. 106). In their briefs filed with the Court of Appeals, neither party contested federal court jurisdiction. The Defendant addressed the TIA only in a footnote in each brief she filed, asserting that the Court could exercise jurisdiction without running afoul of the TIA. *See* Appellant's Brief at 31 n.3; Appellant's Reply Brief at 16 n.8. The DMA, in a two-page discussion in its jurisdictional statement, addressed those aspects of the TIA necessary to demonstrate its inapplicability. Appellee's Brief at 3-4.

On August 20, 2013, the Tenth Circuit issued its opinion and judgment. Pet.App. A-1 – A-33. The Court ruled that the TIA divested the District Court of jurisdiction to enjoin enforcement of the Colorado Act. *Id.* at A-33. The Court, therefore, did not reach the merits of the DMA's Commerce Clause claims. *Id.* at A-3.

The Court of Appeals acknowledged that the DMA's suit "differs from the prototypical TIA case."

Id. at A-18. The Court further conceded that "[e]ven if DMA's constitutional attack on the notice and reporting obligations were successful, Colorado consumers would still owe use taxes by law." *Id.* However, focusing on the word "restrain" in the TIA, the Court determined that the DMA's challenge to the Colorado Act was subject to the TIA because the suit "if successful, would limit, restrict, or hold back the state's chosen method of enforcing its tax laws and generating revenue." *Id.* at A-17. The Tenth Circuit concluded that the TIA applies "both to a lawsuit that would directly enjoin a tax and one that would enjoin a procedure required by the state's use tax statutes and regulations that aims to enforce and increase use tax collection." *Id.* at A-19.

4. On September 18, 2013, the DMA filed a petition for rehearing en banc by the Tenth Circuit. On October 1, 2013, the Court of Appeals denied the request. Pet.App. D-1 – D-2.

5. On February 25, 2014, the DMA filed its petition for a writ of certiorari to the Tenth Circuit. The Court granted the DMA's petition on July 1, 2014.

6. In addition to filing a petition for certiorari, the DMA on November 5, 2013, filed suit in Colorado state court in an effort to reestablish the injunction against the Colorado Act before the annual requirements imposed on non-collecting retailers (*i.e.*, the mailing of Annual Purchase Summaries and the filing of Customer Information Reports with the

Department) took effect. *See Direct Marketing Ass'n v. Department of Revenue and Barbara Brohl*, Case No. 13 CV 34855 (District Court for the City and County of Denver). On February 18, 2014, the state court granted the DMA's motion for a preliminary injunction and enjoined enforcement of the Colorado Act.

On July 10, 2014, the state district court stayed all further proceedings before it, pending resolution of this appeal.

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SUMMARY OF ARGUMENT

I. The purpose of the TIA is to foreclose federal court jurisdiction over suits brought by taxpayers seeking to invoke federal equity jurisdiction as a means of circumventing standard state administrative procedures for contesting state tax liability. The TIA is not a "sweeping congressional direction to prevent 'federal-court interference with all aspects of state tax administration.'" *Hibbs*, 542 U.S. at 105 (citation omitted). Challenges, like the DMA's, brought by non-taxpayers who contest neither their own tax liability, nor anyone else's, and which present none of the elements of the prototypical TIA case, are not barred. *See Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 430 (2010) (explaining that the TIA does not apply to suits by "outsiders" whose tax liability is not a relevant factor).

II.A. The language of the TIA must be construed in context. The Tenth Circuit misinterpreted the term "restrain" in the TIA by using recent, selected dictionary definitions without reference to the overall statutory scheme. The Tenth Circuit's preferred meaning of "restrict, limit, or hold back" is inconsistent with the inclusion in the TIA of the related terms "enjoin" and "suspend."

The terms "enjoin, suspend or restrain" are used in the TIA as terms of art with reference to federal court equitable remedies. Together, these terms bar federal court jurisdiction to grant any form of equitable relief that would prevent the assessment, levy or collection of a state tax. The TIA's language describes a more targeted jurisdictional limitation than the AIA. The TIA does not extend to every suit having the potential, however remote, of impeding the payment of taxes by taxpayers.

B. The Tenth Circuit's repeated reference to the notice and reporting requirements of the Colorado Act as "collection methods" is a mischaracterization. The TIA refers to three specific taxing functions performed by state tax officials: assessment (the recording of liability), levy (the seizure of property), and collection (measures for recovery of tax amounts). The third-party notice and reporting obligations challenged by the DMA in this case do not require the DMA's affected members to collect, report or pay any state tax, nor do the law's provisions constitute "the assessment, levy, or collection" of a tax by the Colorado Department of Revenue.

Prior decisions regarding similar state laws demonstrate that the TIA does not bar a suit brought by non-taxpayers against notice and reporting provisions like those imposed under the Colorado Act. *E.g.*, *UPS*, 318 F.3d at 330-32 (Butler Act does not require dismissal of suit contesting law imposing regulatory obligations on non-taxpayer); *Florida Bankers*, 2014 WL 114519, at *6-*7 (AIA does not bar suit against information reporting statute). Moreover, the Tenth Circuit's interpretation of the "collection" of a tax as covering any provision "enacted to ensure compliance" with state taxes (Pet.App. at A-17) would shield any state law purporting to have some bearing on tax payment from review in federal court. *See Wells*, 510 F.2d at 77 (TIA does not preclude challenge to every measure intended to secure tax payment).

III. The value of access to federal court is an appropriate factor in interpreting and applying the TIA. State courts are capable of protecting federal rights, but access to federal courts is a significant factor in promoting confidence in our nation's judicial system.

IV. The "more embracive" doctrine of comity does not require dismissal of the DMA's claims. The Executive Director did not raise comity in the district court or before the Tenth Circuit. None of the concerns of comity in state tax cases are presented by the DMA's challenge to the non-tax, notice and reporting provisions of the Colorado law. Nor are the "confluence of factors" described in *Levin*, 560 U.S. at 431-32, applicable to the DMA's suit.

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ARGUMENT

I. THE TIA DOES NOT BAR JURISDICTION OVER SUITS BY "OUTSIDERS" CHALLENGING PROVISIONS ONLY INDIRECTLY RELATED TO STATE TAX ADMINISTRATION.

By design, the TIA restricts federal court jurisdiction over challenges brought by taxpayers who seek to contest their liability for state taxes by circumventing available state administrative procedures. The principal purpose of the TIA was elucidated by the Court in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943). As the Court explained, under established equity practice pre-dating the TIA, federal courts routinely declined to protect private parties through equitable relief when "the exercise of [the court's] jurisdiction would be prejudicial to the public interest." *Id.* at 297 (brackets added). In particular, "assaults in the federal courts on the validity of state taxation" through injunctive relief "restraining collection of state taxes" were understood to interfere unduly with a state's fiscal affairs, at least where the state provided a taxpayer an adequate remedy at law to contest such taxes. *Id.* at 298. In sanctioning this established practice of withholding equitable relief to aggrieved taxpayers, the TIA "was predicated upon the desirability of freeing, from interference by the federal courts, state procedures which authorize litigation challenging a tax only after the tax has been paid." *Id.* at 301 (*citing* Senate and House reports regarding the TIA) (copies of which are included in the Br.App. at 19-28).

Since *Great Lakes* was decided, the Court has consistently articulated the TIA's limitation on interference with state tax collection as designed to prevent a taxpayer from invoking the equity jurisdiction of the federal court as an alternative avenue for disputing state tax liability. *See, e.g., Tully v. Griffin*, 429 U.S. 68, 73 (1976) (*citing Great Lakes*); *Rosewell*, 450 U.S. at 523-24 (concluding that Congress intended to require taxpayers in all circumstances to pursue available state refund claims before obtaining access to federal courts); *Jefferson County, Ala. v. Acker*, 527 U.S. 423, 435 (1999) ("The Tax Injunction Act was thus shaped by state and federal provisions barring anticipatory actions by taxpayers *to stop the tax collector from initiating collection proceedings*.") (italics added). In *California v. Grace Brethren Church*, 457 U.S. 393 (1982), the Court explained that the principle of "non-interference" is necessary because, "[i]f federal [equitable] relief were available *to test state tax assessments*, state tax administration might be thrown into disarray, and *taxpayers might escape the ordinary procedural requirements imposed by state law*." *Id.* at 410 (*quoting Perez v. Ledesma,* 401 U.S. 82, 127 n.17 (1971)) (Brennan, J., concurring in part, dissenting in part) (brackets and italics added). Most recently, in *Hibbs,* the Court reiterated that "in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority." 542 U.S. at 104-05.

This focus on preventing taxpayers from using federal courts as an alternative forum for contesting the validity or amount of a tax is confirmed by the Anti-Injunction Act, on which the TIA was, in part, based. In *Williams Packing*, the Court explained that the AIA's "manifest purpose" is to allow the United States to "assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund." 370 U.S. at 7 and n.6 (noting the parallel purpose of the TIA); *see also Howland v. Soule*, Deady 413, 12 F.Cas. 743, 744 (D. Cal. 1868) (the AIA "prohibits all suits to enjoin the collection of a tax, and leaves the person who considers himself aggrieved by the collection thereof to the ordinary and usual remedy – an action at law to recover back the amount paid").

Based on the central purpose of the TIA, the prototypical suit over which the TIA bars federal court jurisdiction is an action brought (1) by a taxpayer, who is (2) contesting the validity of, or liability for, state taxes, by (3) invoking federal equity jurisdiction as a means of circumventing available state administrative procedures for determining such tax liability. These elements, when present, clearly trigger the TIA's jurisdictional bar, so long as the State affords a "plain, speedy and efficient remedy" to the taxpayer. The TIA has, for example, been held to preclude federal court jurisdiction over suits brought by taxpayers to restrain state court collection proceedings on grounds that the tax in question was invalid (*Kohn v. Central Distributing Co.*, 306 U.S. 531, 532 (1939)); to stay state administrative tax appeal procedures based on the contention that the state lacked the authority to impose a sales tax collection obligation on the plaintiff (*Tully*, 429 U.S. at 69-70); and to prevent publication of a notice of sale for non-payment of property tax alleged to be assessed in violation of the federal and state constitutions (*Rosewell*, 450 U.S. at 510).

The TIA is not, however, a sweeping prohibition against "federal-court interference with all aspects of state tax administration." *Hibbs*, 542 U.S. at 105. In challenges brought by tax "outsiders," *see Levin*, 560 U.S. at 430, who contest *no one's* tax liability and whose claims present none of the elements of a prototypical TIA case, neither the language nor the purpose of the statute require a district court to dismiss the suit on jurisdictional grounds.

II. THE TENTH CIRCUIT MISINTERPRETED THE TIA.

A proper understanding of the TIA begins with the words of the statute, which must be construed, understood in context, and applied consistent with the underlying purpose of the Act. *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1356-57 (2012) (where words may have more than one meaning, statutory language "cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (*quoting Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

There are two operative sets of words in the TIA: "enjoin, suspend or restrain" and "assessment, levy or collection." The Tenth Circuit relied entirely upon its reading of the term "restrain." Pet.App. at A-16 ("The issue is whether DMA's attack on Colorado's notice and reporting obligations would 'restrain' Colorado's tax collection."). The Tenth Circuit, however, misinterpreted the meaning of "restrain" as used in the TIA, and failed to acknowledge that none of the notice and reporting requirements of the Colorado Act constitute "the collection" of a tax as that taxing function is properly understood.

A. "Enjoin," "Suspend" And "Restrain" Are Terms Of Art With Reference To Equity Jurisdiction.

In construing the term "restrain," the Tenth Circuit relied solely upon selected dictionary definitions for its conclusion that the word should be interpreted to mean "limit, restrict or hold back." *Id.* at A-17. In selecting its preferred meaning, however, the Court of Appeals cited three dictionaries that were unavailable when the TIA was enacted (from 1976, 2009, and 2011), and included a definition of the related form "restraint" contained in a recent edition of Black's Law Dictionary. *Id.*; *cf. Hibbs*, 542 U.S. at 116 (Kennedy, J., dissenting) (critiquing the lower court's reading of the term "assessment" in the TIA because the court relied solely on current sources, selected portions of definitions, and a variant of the word actually being defined). In choosing its definition, the Tenth Circuit also failed to note that other recently-published dictionaries give meanings of "restrain" that are stronger and more preclusive, including "to prevent (someone or something) from doing something" (Oxford Dictionaries 2014) (http://www.oxforddictionaries.com/us/definition/american_english/restrain) and "to control the actions or behavior of someone by force, esp. in order to stop that person from doing something." Cambridge Dictionaries Online, http://dictionary.cambridge.org/dictionary/american-english/restrain (Cambridge University Press 2014); *see also* American Heritage Dictionary of the English Language (5th ed. 2011) ("to prevent (a person or group) from doing something or acting in a certain way").[1]

Even more fundamentally, the Tenth Circuit's approach to statutory construction ignored the context in which the word "restrain" is used in the TIA, both as it relates to the associated terms "enjoin" and "suspend,"[2] and with respect to the TIA's original placement in the Judicial Code. *See Davis*, 489 U.S. at 809 (words of a statute must be read with reference to their context and placement in the overall statutory scheme).

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[1] The edition of Black's Law Dictionary in print when the TIA was enacted likewise contained both mild and stronger variations on the meaning of the word "restrain," listing possible definitions that included, alternatively, "to limit" and "restrict" or "to prohibit from action." Black's Law Dictionary at 1548 (3d ed. 1933). Merely referring to the "ordinary" dictionary definition, therefore, does not resolve the proper meaning of the term as used in the TIA. *Sea-Land Services*, 132 S. Ct. at 1356-57 (where "ordinary" meaning presents two viable alternatives, resort to context is required).

First, in light of the words "enjoin" and "suspend" in the TIA, the meaning of the term "restrain" adopted by the Tenth Circuit quickly leads to interpretive problems. If "restrain" encompasses any action that would "restrict," "limit" or "hold back" state tax officials from the "assessment, levy, or collection" of a state tax, the terms "enjoin" or "suspend" are rendered superfluous. *See Hibbs*, 542 U.S. at 101 (describing the rule against superfluities). Instead, the word "restrain," by itself, "would do all the necessary work" of describing relief that would prohibit action by state officials, *See id.* (noting that the juxtaposition of "levy" and "collection" in the TIA dictates a more narrow reading of "assessment"). Had Congress intended the words of the TIA to foreclose jurisdiction over any suit that might "restrict" tax collection, it could have accomplished that objective with a single word; instead, Congress employed three distinct terms.

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[2] In choosing among its preferred dictionary definitions, the Tenth Circuit purported to apply the principle that the use of the disjunctive term "or" in the TIA suggests that each term employed should be given a distinct meaning. Pet.App. at A-16. But the Court of Appeals assigned the *same* essential meaning to both "enjoin" and "suspend" (finding that both words mean "entirely arresting tax collection"), before electing to give the word "restrain" a different, and less precise, meaning. *See id.* at A-17.

Moreover, when properly read in context, the words "enjoin, suspend or restrain" are used in the TIA as terms of art. Together, they describe an express carve-out from Congress' grant of authority to the district courts that can only be understood with reference to the courts' traditional exercise of equity jurisdiction. *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 126 and n.13 (1981) (Brennan, J., concurring in the judgment) ("suspend" and "restrain" in the TIA "surely seem to evoke association with the language of equitable actions"); *see also Rettig Beverage Co. v. United States*, 13 F.2d 740, 742-43 (3d Cir. 1926) (use of the term "to enjoin" supports the conclusion that Congress intended to describe an equitable action and remedy under National Prohibition Act). As Justice Brennan explained in his concurrence in *Fair Assessment*, the terms of the TIA are not so "encompassing" as to implicate any suit that may "chill" state tax collection, but instead must be interpreted in accordance with their "specialized legal meaning" with regard to equity jurisdiction. 454 U.S. at 126 and n.13.

"[I]t is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *F.A.A. v. Cooper*, 132 S. Ct. 1441, 1449 (2012) (citations omitted); *see also Microsoft Corp. v. i4i Ltd. Partnership,* 131 S. Ct. 2238, 2245 (2011) (the understanding of a common law term of art displaces the word's ordinary meaning).

As used with respect to equity jurisdiction, there is a common thread running through the terms "enjoin, suspend or restrain." As the Court has noted, the terms refer, in general, to the exercise of a court's equitable powers to grant anticipatory relief, *i.e.*, "suits *to stop* ('enjoin, suspend or restrain') the collection of taxes." *Jefferson County,* 527 U.S. at 433 (italics added). Moreover, as used by courts and leading treatises, the terms "enjoin" and "restrain" are frequently employed interchangeably with regard to equitable relief to mean "to prevent." For example, in *Ex Parte Young*, the Court repeatedly uses both "enjoin" and "restrain" at different points to describe injunctive relief granted by a court to prevent the enforcement of unconstitutional state laws by state officials. *Compare,* 209 U.S. at 152 (discussing the general doctrine that federal courts will "*restrain* a state officer from executing an unconstitutional statute of the state" when to execute it will cause irreparable harm) (italics added) and 155-56 (explaining that state officers, vested with the requisite authority to enforce an unconstitutional act may be "*enjoined* by a Federal court of equity from such action") (italics added); *see also,* Joseph Story, Commentaries on Equity Jurisprudence, § 872, at 367 (3d English ed. 1920) (enumerating the "ordinary objects of the remedial writ of injunctions" for which the "relief consists in *restraining* the commission or the continuance of some act of the defendant") (italics added); Black's Law Dictionary at 1548 (3d ed. 1933) (definition of "restrain" means "[t]o enjoin (in equity.)").

Consistent with the TIA's central purpose of precluding federal court jurisdiction over taxpayer suits contesting state tax liability, the common thread running through the terms "enjoin, suspend or restrain" in the TIA is thus a withdrawal of the courts' power to grant equitable relief preventing the assessment and collection of taxes by state officials.

At the same time, canons of construction dictate that terms connected in the disjunctive should be given separate meanings. *Garcia v. United States*, 469 U.S. 70, 73 (1984). In the case of the TIA, this interpretive rule is consistent with, and reinforcing of, the terms' shared meaning with reference to equitable remedies that prevent the assessment and collection of state taxes, because each term contributes distinctly to the TIA's objective of foreclosing the district courts' jurisdiction to grant such relief.

The words' distinct significance is apparent when analyzing the terms in conjunction with one another. Since the purpose of the TIA was to eliminate the equitable jurisdiction of the district courts over suits by taxpayers seeking to "stop" state tax collection, *Jefferson County*, 527 U.S. at 433, the term "enjoin," by itself, would be inadequate to accomplish that objective. A prohibition solely on the court's jurisdiction to "enjoin" state tax collection would invite other types of challenges, seeking forms of equitable relief other than injunctions, such as declaratory judgments, stays, constructive trusts, and claims for unjust enrichment of the state. In order to foreclose such other remedies, additional words are necessary. The inclusion of the words "suspend" and "restrain" achieves that result. *See Grace Brethren Church*, 457 U.S. at 408 (interpreting the terms "suspend" and "restrain" as expanding the scope of the TIA to cover declaratory judgment actions). A more detailed review of each term proves the point.

1. "Enjoin"

The term "enjoin" is commonly associated with injunctive relief that prohibits some act by the defendant. In addition to meaning "prohibit," however, the term "enjoin" also "has meaning in an affirmative sense." *Hibbs*, 542 U.S. at 118 (Kennedy, J., dissenting) (noting that, at the time the TIA was enacted, "enjoin" was defined to include "to require; command; [and] positively direct") (*citing* Black's Law Dictionary (3d ed. 1933)).[3] Thus, "enjoin" as used in the TIA would preclude a district court both from entering an injunction prohibiting tax collection, and from affirmatively commanding tax officials to provide certain types of tax relief which would also prevent the collection of taxes, such as ordering a "refund" of moneys paid, granting a tax exemption, or requiring the abatement of tax penalties.

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[3] With reference to equity, the 1933 edition of Black's Law Dictionary further defines "enjoin" to mean "[t]o require a person, by writ of injunction from a court of equity, *to perform*, or to abstain or desist from, some act." Black's Law Dictionary at 663 (3d ed. 1933) (italics added).

2. "Suspend"

The term "suspend" connotes a temporary prohibition against some act and supplements the term "enjoin" by foreclosing preliminary injunctive relief. As it relates to equity, the term "suspend" had particular significance with reference to a temporary prevention of action by public officials. *See* Black's Law Dictionary at 1690 (3d ed. 1933) ("suspend" includes "[t]o forbid a public officer from performing his duties or exercising his functions for a more or less definite interval of time").

In addition, other forms of non-injunctive, equitable relief could also result in temporary suspensions of state tax collection. At the time the TIA was enacted, the power to enter a stay of the proceedings of another tribunal was understood to be within the authority of a court sitting in equity, but not within the authority of a court sitting in law. *See Enelow v. New York Life Ins. Co.*, 293 U.S. 379, 382 (1935) ("The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles.").[4] As the Court has more recently noted, "[a]n injunction and a stay have typically been understood to serve different purposes." *Nken v. Holder*, 556 U.S. 418, 428 (2009). While an injunction commands the action, or inaction, of an individual, a stay temporarily suspends a judicial (or other) proceeding, "by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability." *Id.* (*citing* Black's Law Dictionary (6th ed. 1990) (defining "stay" as "a suspension of the case or some designated proceedings within it")).

Taxpayers seeking to stay a component of the tax collection process under state law have routinely been barred from proceeding in federal court by virtue of the TIA. *See, e.g., Tully*, 429 U.S. at 70 (suit seeking to stay the running of administrative appeal period applicable to state tax assessment barred by TIA); *Central Distributing*, 306 U.S. at 532-34 (TIA forecloses jurisdiction over action by taxpayer seeking to stay tax collection proceedings); *Forjone v. Leavitt*, 2008 WL 1926680 (W.D.N.Y. April 30, 2008) at *4 (TIA requires dismissal of suit seeking a stay of property tax foreclosure proceedings). While the addition of "suspend" extends the TIA to equitable remedies temporarily prohibiting state tax collection, there are certain other forms of equitable relief that could bar state tax officials from performing their taxing functions, unless also addressed by the TIA.

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[4] Because a stay was a form of equitable relief, the Court in *Enelow* equated the entry of a stay with an injunction for purposes of interlocutory appeal, but the rule proved unworkable and *Enelow* was later overruled. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 282-83 (1988). However, as a traditional form of equitable order, a stay is a type of relief that a court might enter to "suspend" the action of state tax officials.

3. "Restrain"

The term "restrain" as used in the TIA serves to encompass, consistent with its widespread usage in traditional equity practice (*see supra* at 26-27), any other type of equitable remedy (*e.g.*, constructive trusts, rescission, writs of mandamus) that may be entered by the district courts to prevent state officials from collecting taxes. This Court has accordingly interpreted the TIA to prevent other forms of equitable relief. *See Grace Brethren Church*, 457 U.S. at 408 (terms "suspend" and "restrain" extend the scope of the TIA beyond injunctive relief to preclude entry of declaratory judgment); *cf. Radian Ins., Inc. v. Deutsche Bank Nat'l Trust Co.*, 2009 WL 3163557 at *5 (E.D. Pa. Oct. 1, 2009) (FIRREA's bar against court taking "action to restrain or affect" the powers of FDIC precludes equitable remedies including not only injunctions but also constructive trust, rescission, and specific performance) (collecting cases).

Taken together, the terms "enjoin, suspend or restrain" are properly interpreted to encompass all forms of equitable relief that might prevent state tax officials from carrying out the "assessment, levy or collection" of a state tax.

4. The Jurisdiction-Limiting Language of the TIA Differs from the AIA.

The TIA was adopted against a backdrop of other jurisdiction-limiting statutes, including the AIA, but there is an important difference between the TIA and the AIA with regard to the language used to circumscribe the court's jurisdiction. While the TIA precludes the exercise of equity jurisdiction by a federal court to "enjoin, suspend or restrain" state tax collection, the AIA more generally precludes courts, both federal and state, from exercising jurisdiction over any action *"for the purpose of restraining"* the collection of any federal tax. 26 U.S.C. § 7421(a) (italics added). The difference in the words chosen by Congress in this regard is significant.

First, the AIA does not juxtapose the word "restraining" against related terms such as "enjoin" and "suspend," indicating that it has a broader application than the term "restrain" as used in the TIA. In the TIA, "restrain" must have a meaning distinct from "enjoin" and "suspend," with reference to the exercise of equity jurisdiction by the federal court, which necessarily circumscribes its meaning.

Next, the phrase "for the purpose of" expands the scope of the AIA to consideration of the objectives of the plaintiff in filing suit, rather than directing the focus to the types of remedies a court may order in granting equitable relief, as is the case with the TIA. Courts have long emphasized that the purpose of the plaintiff in bringing suit is a significant factor in applying the jurisdictional limitation of the AIA. *See, e.g., Snyder,* 109 U.S. at 191 ("The sole object of the suit is to restrain the collection of a tax which purports to have been assessed under the internal revenue laws."); *Miles v. Johnson*, 59 F. 38, 40 (D. Ky. 1893) ("I must conclude the purpose of these suits is to restrain the collection of the taxes which are due. This would be the necessary effect of the relief if granted, and it must be the purpose, as the only contention is that no tax should be collected.").

This Court has noted that the AIA's reference to the suit's "purpose" expands the reach of the statute to actions that do not directly challenge the assessment or collection of taxes. In *Alexander v. 'Americans United' Inc.*, 416 U.S. 752, 760 (1974), the Court rejected the Court of Appeals' conclusion that a challenge to the withdrawal of the taxpayer's 501(c)(3) status would only have the "collateral effect" of restraining the collection of taxes from donors to the organization. The Court noted that the plaintiff "would not be interested in obtaining the declaratory and injunctive relief requested if that relief did not effectively restrain the taxation of its contributors." *Id.* at 761. The Court concluded that "[u]nder any reasonable construction of the statutory term 'purpose,' the objective of this suit was to restrain the assessment and collection of taxes from respondent's contributors." *Id.* at 760.[5]

The difference in the language and scope of the two statutes in this regard is also consistent with their distinct objectives. The AIA was enacted in 1867 as part of the Internal Revenue Code to prevent challenges to federal taxes in both state and federal courts. *Williams Packing*, 370 U.S. at 5 (object of the AIA was to "withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes"). Congress did not adopt the AIA to correct perceived excesses in the exercise of federal court jurisdiction, in the way the TIA was meant to address conditions after the Court's decision in *Ex Parte Young,* through a carve-out from the statutory grant of jurisdiction to the federal district courts.

The AIA's more expansive prohibition on pre-enforcement relief is understandable. A taxpayer with an objection concerning federal taxes will, through the normal administrative appeal process, eventually have access to a federal court (either the District Court, or the Tax Court) in order to present its claims. Under the TIA, by contrast, a taxpayer may be excluded from the federal district court altogether, so long as there is a "plain, speedy and efficient" remedy available in state court.[6]

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[5] Even if the TIA were interpreted to apply to any suit filed "for the purpose of restraining" states taxes, it would still not bar the DMA's claims. The purpose of the DMA's suit is not to prevent the assessment of Colorado use tax, but rather to prevent the imposition of discriminatory notice and reporting obligations on its affected members. This is not a case, like *'Americans United,'* where the asserted purpose is merely a "restatement," in different words, of an actual purpose of preventing tax from being imposed on a third-party. *See 'Americans United,'* 416 U.S. at 760-61 (purported goal of preventing loss of donations was synonymous with ensuring donors could claim deductions and thereby reduce tax liability).

Thus, contrary to the Tenth Circuit's conclusion, neither the language nor the purpose of the TIA support an interpretation of the Act as foreclosing jurisdiction based on a lawsuit's mere "potential to restrain tax collection." Pet.App. at A-18. Any procedure having even the most remote connection to the recovery of revenue would then be implicated. For example, a suit challenging, on Fourteenth Amendment grounds, the bid process by which the Department of Revenue acquired a new computer system might be said to "undermine state tax collection" (*see* Pet.App. at A-17) and thus be subject, under the Tenth Circuit's construction, to the TIA's jurisdictional bar, but it could not seriously be contended that the TIA extends to a suit of this nature.

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[6] To the extent there is a state court remedy available to out-of-state retailers for contesting the notice and reporting obligations imposed under the Colorado Act, it is a general declaratory judgment action under the state version of the Uniform Declaratory Judgments Law, Colo. Rev. Stat. § 13-51-101 *et seq.*, and not one "tailormade for taxpayers." *See Hibbs*, 542 U.S. at 107 (TIA's jurisdictional limitation must be read "harmoniously" with the requirement that state law must provide a plain, speedy and efficient remedy "tailormade for taxpayers"). The Colorado Act itself contains no provision setting forth a remedy for challenging either the notice and reporting obligations, or the imposition of a penalty for non-compliance. *See generally* Colo. Rev. Stat. §§ 39-21-112(3.5)(c)&(d). The absence of such a specific administrative remedy for challenging the Act further indicates that the Colorado Act is not among the types of state laws that Congress dictated should be challenged only in state court. *Id.* at 104-05 ("in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority").

B. The Notice And Reporting Obligations Of The Colorado Act Are Not The "Assessment, Levy Or Collection" Of Any Tax.

The Tenth Circuit's repeated reference to the Colorado Act's notice and reporting requirements as "collection methods" is a clear mischaracterization. None of the requirements of the Colorado Act constitute "the assessment, levy or collection" of a state tax within the meaning of the TIA.

1. "Assessment," "Levy" and "Collection" Describe Specific Taxing Functions Performed by State Tax Officials.

The TIA applies to three taxing functions: assessment, levy and collection. Congress focused on specific procedures regularly undertaken by states to record and recover taxes that are due from taxpayers. *See Hibbs,* 542 U.S. at 105 n.7 (contrasting TIA's reference to "those aspects of state tax regimes that are needed to produce revenue – *i.e.*, assessment, levy and collection" with the Johnson Act's broader prohibition against interference with "the operation of, or compliance with" public utility rate orders).

The words "assessment," "levy" and "collection" are also terms of art in the area of taxation, most readily defined with reference to another federal statute, the Internal Revenue Code. *See Hibbs*, 542 U.S. at 100 ("assessment" defined with reference to provisions of Title 63 of the IRC); *see also National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2584 (2012) ("'Assessment' and 'Collection' are chapters of the Internal Revenue Code providing the Secretary authority to assess and collect taxes, and generally specifying the means by which he shall do so.").

a. "Assessment"

In *Hibbs*, there was broad agreement among members of the Court that "assessment" as used in the TIA refers to "the recording of a taxpayer's ultimate tax liability" upon the state's tax rolls. *See* 542 U.S. at 114-17 (Kennedy, J., dissenting) (noting agreement with the majority's discussion of the term, *see* 542 U.S. at 100-02). Such a reading is consistent not only with the term's meaning as used in the Internal Revenue Code, 26 U.S.C. § 6203 ("assessment shall be made by recording the liability of the taxpayer in the office of the Secretary"), but also with recent court decisions and tax treatises. *E.g.*, *Seven-Sky v. Holder*, 661 F.3d 1, 11 (D.C. Cir. 2011) (*citing*

Hibbs), *abrogated on other grounds by National Fed'n of Indep. Bus.*, 132 S. Ct. 2566 (2012); Michael I. Saltzman, IRS Practice and Procedure ¶ 10.01[1] (Rev. 2d ed. 2002) ("An 'assessment' is the formal recording of the taxpayer's liability, fixing the amount payable.").

b. "Levy"

The Tenth Circuit made no mention of the term "levy," but its meaning is readily ascertainable from the Code. Under § 6331(a), "levy" refers generally to the seizure of property "by any means." 26 U.S.C. § 6331(a), (b) (authority of Secretary to levy upon property).

c. "Collection"

Chapter 64 of the Internal Revenue Code is entitled "Collection." *See* 26 U.S.C. §§ 6301 *et seq.* Collection begins with notice that a taxpayer is liable for an unpaid amount and a demand that the taxpayer pay it. *See* 26 U.S.C. § 6303(a); *Seven-Sky*, 661 F.3d at 11. On the state level, similar measures would include the issuance of an assessment to a taxpayer. *See, e.g.*, *Tully*, 429 U.S. at 69-70. If, after being notified, the taxpayer fails to pay, the taxing authorities "can employ various collection methods, including liens and levies on the taxpayer's property." *Seven-Sky*, 661 F.3d at 11 (*citing* 26 U.S.C. § 6303; § 6311 (means of payment); § 6321 (liens); § 6331 (levies)). Collection measures also include court proceedings and similar actions undertaken by state officials to enforce state taxes. *See, e.g., Central Distributing*, 306 U.S. at 534 (state court attachment proceedings); *Rosewell*, 450 U.S. at 510 (publication and notice of tax sale).

2. The Tenth Circuit's Ruling Would Expand the TIA's Jurisdictional Bar Farther than Any Other Court to Include Provisions Encouraging Voluntary Compliance by Taxpayers.

As is evident from the meaning of the terms "assessment, levy or collection," none of the Colorado Act's requirements – not the Transactional Notice, not the Annual Purchase Summary, not the Customer Information Report – constitute either a recording of a taxpayer's liability (assessment), the seizure of property (levy), or the recovery of amounts due (collection).

In reciting the objective for each of the requirements of the Colorado law, the Executive Director framed the requirement in terms of its hoped-for effect on voluntary self-reporting by Colorado taxpayers. Thus, the Transactional Notice purportedly "serves to educate consumers about their state use tax liability with *the aim of increasing voluntary compliance*." Pet.App. at A-6 (*citing* Appellant's Br. at 12) (italics added). The Annual Purchase Summary similarly "arms the consumer with accurate information *to facilitate reporting and paying the use tax*."

Id. at A-7 (*citing* Appellant's Br. at 13) (italics added). The Customer Information Report "is designed to *increase voluntary consumer compliance* with state tax laws because consumers know that a third party has reported taxable activity to the taxing authority." *Id.* at A-7 (*citing* Appellant's Br. at 13) (italics added). The Executive Director also contends that the Customer Information Report will permit the Department to take future action, if necessary, to "pursue audit and collection activities against taxpayers who fail to pay the tax." *Id.*

The Tenth Circuit thus directly equates measures to promote voluntary tax compliance with "tax collection." As the Court of Appeals states, "Colorado enacted the notice and reporting obligations to increase taxpayers' compliance with use tax laws *and thereby increase tax collection.*" Pet.App. at A-18 (italics added). No court has extended the reach of the TIA's jurisdictional bar so far. To the contrary, courts have rejected the contention that similar measures intended to facilitate, encourage or promote the payment of taxes by taxpayers constitute the "collection" of a tax within the meaning of the TIA and similar jurisdiction-limiting statutes.

a. Federal Court Jurisdiction is Not Foreclosed Over a Suit that Challenges Neither the Validity of the Tax nor the Authority of State Officials to Collect It.

In *UPS*, a closely analogous case, the First Circuit rejected the contention that the Butler Act bars federal court jurisdiction over a challenge to a law that, like the Colorado Act, sought to compel a third party to comply with burdensome regulatory requirements related to excise taxes owed by local residents on the interstate shipment of goods. 318 F.3d at 330-32.

The Puerto Rico law challenged by UPS prohibited a commercial air carrier from delivering a package to a recipient in Puerto Rico unless the recipient provided the carrier with a certificate from the Puerto Rico Department of Treasury indicating that the excise tax due on the package's contents was paid. *Id.* at 326. Failure to obtain the certificate subjected the air carrier to fines and to payment of the tax on the package's contents. *Id.* As an alternative to obtaining the certificate, carriers could pre-pay the taxes due to the Department and seek to collect them from the recipient. *Id.*

Adopting a position strikingly similar to the reasoning of the Tenth Circuit in this case, the Puerto Rico Department of Treasury argued that the Butler Act barred federal court jurisdiction because the suit constituted a challenge to the statutory mechanism adopted to promote "collection" of the Puerto Rico excise tax. *Id.* at 330. The First Circuit disagreed. The Court noted that "[n]ot every statutory or regulatory obligation that may aid the Secretary's ability to collect tax is immune from attack in federal court." *Id.* at 331. In a passage that might have been written for this case, the First Circuit explained that UPS "did not challenge the amount or validity of the tax due from consumers, nor the authority of [revenue officials] to assess or collect it." 318 F.3d at 330-31 (brackets added). The Court held that the regulatory provisions adopted by Puerto Rico, which relied on "the threat of sanctions against private parties who do not even owe the tax at issue" to produce tax money indirectly, did not constitute "a system of tax collection" within the meaning of the Butler Act. *Id.* at 331.

In direct opposition to the First Circuit's decision in *UPS*, the Tenth Circuit determined that the TIA applies to any "procedure required by a state's taxing statutes that aims to enforce and increase tax collection." Pet.App. at A-19. The term "collection" could thus be understood to encompass similar informational notice and reporting obligations imposed on credit card issuers that provide statements to consumers (because credit cards are used to make taxable purchases), telecommunications carriers that provide cell phone service (because mobile devices are used to place orders for taxable goods), and social media networks (on which retailers maintain pages viewed by consumers). If any statutory or regulatory provision that may *encourage voluntary tax payment* is covered, the term "collection" loses any significance as a taxing function.

b. Not Every Measure Intended to Secure Tax Payment is Covered by the TIA.

The reasoning of the Tenth Circuit is also refuted by the Second Circuit's decision in *Wells*. Judge Friendly reviewed a challenge by a taxpayer to a statute that allowed the suspension of a motorist's driver's license for failure to pay the excise tax on his vehicle. 510 F.2d at 76. The plaintiff did not dispute that he owed the tax and had failed to pay it. *Id.* The plaintiff challenged the suspension of his driver's license on the ground that classifying motor vehicle operators based on their payment (or non-payment) of the excise tax violated the Equal Protection Clause. *Id.*

Just as the Tenth Circuit asserted in the decision below, the defendant in *Wells* argued that the plaintiff was seeking to "restrain collection" of the excise tax within the meaning of the TIA. *Id.* at 77. Judge Friendly noted that the term "collection" might be read "broadly to include anything that a state has determined to be a likely method of securing payment," but concluded that in enacting the TIA, Congress had not "intended to go so far." *Id.* Rather, the Court held that the term "collection" was meant to apply to state procedures "that would produce money or other property directly, rather than indirectly through a more general use of coercive power." *Id.*

The Tenth Circuit purported to endorse Judge Friendly's conclusion that the TIA does not extend so far as to bar "any action challenging a state law that could possibly secure tax payment." Pet.App. at A-23. The Tenth Circuit's reasoning, however, is at odds with the principle it professes to approve. Earlier in the Tenth Circuit's opinion the Court of Appeals concludes that the DMA's claims are barred *precisely because* they purport to challenge Colorado's "chosen method to secure [use] taxes." *Id.* at A-18 (brackets added). *Wells* stands for the proposition that the TIA does not prevent a challenge to any and all state measures, however indirect, that are intended to increase taxpayer compliance, but that is precisely the manner in which the Tenth Circuit applied the TIA to the Colorado Act.[7]

The Tenth Circuit also strives to distinguish *Wells* on the grounds that it concerned a "punitive" measure imposed on a taxpayer that had refused to pay taxes, in contrast to the Colorado Act, which it describes as outlining measures that "attempt to secure tax compliance in the first instance." *Id.* at A-23. Judge Friendly, however, rejected a similar invitation to parse between "collection" and "enforcement" measures based on the timing of their application, and instead construed the TIA's use of the term "collection" to mean direct revenue raising measures, rather than indirect means of contriving payment. 510 F.2d at 77. The Act and Regulations are, in any event, unquestionably punitive and coercive[8] as to out-of-state retailers, who face significant sanction for electing, consistent with *Quill*, not to collect Colorado use taxes.[9]

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[7] The Second Circuit later reaffirmed its reading of the proper scope of the TIA in *Luessenhop v. Clinton County, N.Y.*, 466 F.3d 259, 265 (2d Cir. 2006), stating that "dismissing plaintiffs' causes of action because they pertain to state tax administration in the most general sense would be a patent misreading of the TIA."

c. Reporting Obligations Are Not Within the Scope of the TIA Merely Because They May Improve Tax Compliance.

More recently, in *Florida Bankers*, the district court rejected the government's contention that the

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[8] The Department's Tax Policy Director expressed the opinion that affected out-of-state retailers would find the new notice and reporting obligations sufficiently "unpleasant" that they would simply choose to collect Colorado sales tax, rather than send notices to their customers regarding the purchasers' obligation to self-report use tax. *See* C.A. App. at 132, 146.

[9] Two different district court decisions recently adopted *Wells'* reasoning in rejecting the application to the TIA to statutes conditioning state licensure on the payment of state taxes. *See, e.g., Berjikian v. Franchise Tax Bd.*, 2014 WL 690211, at *2 (C.D. Cal. Feb. 20, 2014) (the TIA does not bar suit brought by taxpayer who does not challenge the validity of the tax but challenges the sanction of license revocation for non-payment of the tax); *Pickell v. Sands*, 2012 WL 6047286, at *5-*6 (E.D. Cal. Dec. 5, 2012) (same).

AIA foreclosed a challenge to a 2012 regulation that required financial institutions to report to the IRS the amount of interest earned by accountholders residing in foreign countries. 2014 WL 114519 at *1. According to the IRS, the new reporting requirement, was "aimed at detecting and deterring tax cheats at home and abroad" and was adopted to help close the growing "tax gap" between income taxes owed and taxes voluntarily reported by taxpayers. *Id.* By gathering information on foreign citizens with accounts in the United States, the Court explained, the IRS could share the information with foreign countries under reciprocity agreements and receive similar information regarding accounts maintained abroad by U.S. citizens. *Id.* at *2. The regulation was deemed by the IRS "essential to the U.S. Government's efforts to combat offshore tax evasion" (*id.* at 3 (citation omitted)) and a measure that would "directly enhance U.S. tax compliance by making it more difficult for U.S. taxpayers with U.S. deposits to falsely claim to be nonresidents in order to avoid U.S. taxation." *Id.* (citation omitted).

The regulations were challenged in federal court by trade associations representing financial institutions as having been adopted in violation of the Administrative Procedures Act and Regulatory Flexibility Act. The government moved to dismiss on various grounds, including that the court lacked jurisdiction over the suit under the AIA. *Id.* at *6. The government argued that non-compliance with the regulation triggered a penalty against the financial institutions, which would then be treated as a "tax" for purposes of the Internal Revenue Code. *Id.*

The court rejected the IRS's argument. The AIA, the court found, is "not so broad as to cover the reporting requirements challenged here." *Id.* The Court further found that the penalty provision was also more like a regulatory penalty than a tax, further weighing against the application of the TIA. *Id.* at *7.

Like the trade associations in *Florida Bankers*, the DMA does not challenge the imposition of any tax, but instead challenges notice and reporting provisions. The regulations in question are only secondary aspects of tax administration, not the primary taxing functions that tax officials perform to record and collect taxes from the persons responsible for them. Perhaps most tellingly, the government in *Florida Bankers* did not even argue that the reporting requirements themselves constituted the "collection" of a tax for purposes of the AIA.

Likewise, in this case, the Executive Director never moved to dismiss the DMA's claims on TIA grounds, and instead informed the Tenth Circuit that the TIA was no bar to its jurisdiction to hear the appeal. In her opposition to the DMA's petition for certiorari, the Executive Director suggested that she chose not to raise the TIA in order to obtain an expedited ruling on the constitutionality of the Colorado Act. Opposition to Petition for a Writ of Certiorari at 5-6 n.1. Clearly, in making this decision, the

Executive Director believed that the district court had jurisdiction to adjudicate the DMA's claims.

d. Distinguishable Cases Dismissing Taxpayer Challenges to Information Gathering By Taxing Authorities are Not Applicable.

In certain cases, the TIA has been applied to exclude from federal court suits brought by taxpayers to prevent the gathering of information necessary to determine the taxpayers' liability for state taxes. For example, in *Blangeres v. Burlington Northern, Inc.*, 872 F.2d 327 (9th Cir. 1989), the court held that the TIA barred jurisdiction over a suit by railroad workers seeking an injunction forbidding their employer to provide earnings information to two states in which the employees had potential income tax liability. The Court found that the TIA applied because precluding the states from obtaining the information would prevent the state from imposing income taxes on the workers. 872 F.2d at 328. The Court noted that the Third Circuit reached a similar result in *Sipe v. Ameranda Hess Corp.*, 698 F.2d 396, 404 (3d Cir. 1982), in dismissing a suit by seamen challenging the withholding of New Jersey unemployment and disability taxes from their wages.

The holdings in these cases are unremarkable, and neither support the Tenth Circuit's boundless interpretation of the TIA, nor dictate dismissal of the DMA's claims. The central purpose of the TIA, like the AIA before it, was to foreclose jurisdiction over pre-enforcement challenges by taxpayers to the imposition of state taxes as a means of circumventing standard administrative procedures for determining such taxes. Taxpayers (or their proxies) who challenge the process for obtaining information regarding their tax liability necessarily challenge the assessment of taxes against them.

Such a suit is fundamentally different from a challenge, like the DMA's, brought by outsiders to the tax system, as to whom the functions of assessment, levy and collection are irrelevant. *See Levin*, 560 U.S. at 430 (explaining that the TIA did not apply in *Hibbs* because the plaintiffs were "outsiders whose own tax liability was not a relevant factor" to the claims asserted). Plaintiffs who do not contest the validity of a tax, who bear no responsibility whatsoever for the taxes in question, and who pursue no tax relief on behalf of the taxpayers themselves, by definition are not invoking the jurisdiction of the federal court to prevent the assessment of a state tax. Indeed, as it relates to the tax liability of the parties subject to the tax, it is doubtful, at best, that an outsider has standing to bring such a challenge in federal court in the first place. *See United States v. Starke*, 2005 WL 3278116, at *2 (M.D. Fla. 2005) ("It is well established that a third party lacks standing to contest the tax assessment of another."). Where no jurisdiction over such a suit exists (due to lack of standing), Congress cannot be said to have withdrawn such jurisdiction by enacting the TIA.

Unlike pre-enforcement suits brought by taxpayers challenging state tax procedures, this is not "a run of the mine tax case" barred by the TIA. *See Levin*, 560 U.S. at 430 (discussing *Hibbs*). To the contrary, the DMA's suit is a challenge by a group of non-taxpayers, located outside the state, who are not obligated to collect or report a tax, and who contest neither the amount, nor the validity of the tax imposed on their Colorado purchasers. More so even than in *Hibbs*, the affected out-of-state retailers are "outsiders," whose "own tax liability is not a relevant factor" at all in the suit. *Id.*

The Tenth Circuit's analysis of non-taxpayer suits mischaracterizes the DMA's contentions. Pet.App. at A-16 (incorrectly asserting that the DMA sought to "avoid the TIA merely because it is not a taxpayer challenging tax payment"). The DMA has never argued, and does not contend, that a federal court has jurisdiction "to enjoin, suspend or restrain the assessment, levy or collection" of a state tax, *solely* because the suit is filed by a third party. Indeed, in *Hibbs*, the Court held that the TIA was inapplicable, not to all third-party suits, but to a specific type of third-party suit brought by plaintiffs who were "outsiders" to the tax credits in question. *See id.*

Far from insisting the TIA is inapplicable merely because the DMA's members are third parties, the DMA contends that its claims do not implicate the TIA based on the language and underlying purpose of the Act. The status of its affected members as non-taxpayers is significant, but not "merely" because they are non-taxpayers. Rather, their status as outsiders, who neither object to their own tax liability, nor to the liability of Colorado purchasers who owe use tax, and who are not seeking to circumvent state administrative procedures, places their suit squarely outside the scope of the TIA.[10]

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[10] The Tenth Circuit concluded that the sole distinction as to the applicability of the TIA is between suits that would have the effect of increasing state tax revenues (like the challenge to state tax credits in *Hibbs*), over which jurisdiction is not prohibited, and suits that would "reduce the flow of revenues to the state," which trigger the TIA. *Id.* at A-21 (*citing Hibbs*, 542 U.S. at 106). The application of the TIA, by its express terms, is not determined *merely* by the potential revenue impact of the challenged provision. Most obviously, penalties may contribute to state revenues, but suits seeking to suspend them are not blocked by the TIA. *See, e.g., Edmondson v. Chamber of Commerce*, 594 F.3d 742, 762 (10th Cir. 2010). Furthermore, a suit challenging a tax exemption as unlawfully discriminatory might be characterized in the alternative as a suit that would raise, or lower, tax revenues, depending upon whether the suit seeks to strike down, or expand, the relevant tax exemption, so the purported revenue impact alone cannot dictate whether the TIA applies. *See Levin*, 560 U.S. at 435 (Thomas, J., concurring in the judgment); *see also Mobil Oil,* 639 F.2d at 917-18 (holding that TIA did not require dismissal of suit against anti-pass through provision of a state tax law, even where invalidating the challenged provision resulted in voiding the entire law, including the tax itself).

3. The Tenth Circuit's Ruling Would Shield Any State Law Nominally Related to Tax Payment from Challenge in Federal Court.

By expanding the concept of "collection" of a tax to include all "state laws *enacted to ensure compliance*" with state taxes (Pet.App. at A-17) and "any procedure required by the state's tax statutes and regulations that *aims to enforce and increase* use tax collection," (*id.* at A-19), the Tenth Circuit insulates from federal court review any law that a state may deem to have some bearing on the payment of a tax, no matter how tenuous the relationship. If the litmus test of federal jurisdiction will be the claimed objective of the challenged state statute, one can readily imagine how state tax codes will become attractive vehicles for regulatory measures serving a variety of purposes, and how optimistic predictions of increased state tax compliance will become commonplace in statements of legislative purpose. Congress, and the federal courts interpreting its enactments, must determine the scope of federal court jurisdiction, not state legislatures interested in precluding review of state laws in federal courts.

A simple hypothetical serves to prove the point. Suppose a state legislature adopts a steep excise tax on the possession of cocaine. *See, e.g.,* Mass. Gen. Laws, ch. 64K, § 8(2) (controlled substances tax); Ga. Code. § 48-15-3 (same). To promote its collection of the tax, state law requires common carriers to unseal, for inspection by revenue officials at the point of entry into the state, all packages destined for delivery to residential addresses.

The ostensible reason for the inspection law is to enable revenue department officials to identify goods (cocaine) on which the tax is due. The actual reason for the law is to: (1) deter shipments of cocaine into the state; and (2) locate and refer recipients of cocaine shipments to the state police. The obligations of the law fall entirely on the carriers, who do not owe the tax and are under no obligation to collect the tax. The unsealing of all packages entering the state is a tremendous burden on the carriers in terms of expense, delay, and loss of customer goodwill. The carriers believe that the state law violates the Commerce Clause, as well as the Fourth, and Fourteenth Amendments.

Under the Tenth Circuit's interpretation of the TIA, a challenge brought by the carriers in federal court to the package inspection requirements must be dismissed. Consistent with the Tenth Circuit's reasoning, because the requirements were enacted with the stated "aim" of increasing tax compliance, and comprise part of the state's "chosen method" for collecting the excise tax due from certain package recipients, the law is immune from challenge in federal court. That the requirements imposed upon the common carriers do not represent the assessment, levy or collection of any tax, and in fact have an ulterior purpose, is irrelevant under the Tenth Circuit's interpretation of the statute. The law's ostensible connection, however remote, to the generation of tax revenue, brings it within the umbrella of the TIA.

III. THE IMPORTANCE OF ACCESS TO FEDERAL COURTS.

The already broad scope of the TIA should not lightly be expanded. The significant value of access to federal courts is an appropriate consideration in interpreting the scope of a statute that limits the jurisdiction of federal courts. Colorado has enacted a law targeted exclusively at companies that are not located in the state, are not Colorado taxpayers, and have no obligation to collect or report any state tax. In the face of such a statute, it is not surprising that an out-of-state company may have concerns about the neutrality and fairness of the forum in which its federal constitutional rights are to be determined.

The issue is not whether state courts are fully capable of addressing federal constitutional questions. Indeed, they are, and the DMA has never argued to the contrary.[11] In our system of justice, however, the confidence of both citizens and commercial interests in the neutrality and fairness of the courts adjudicating their claims is critical. No matter how competent and objective a state court may be, the concern of a non-resident party that it will be disadvantaged because of its foreign status in a state court is a real factor in how our system of justice is viewed by those persons and entities whose fate and affairs will be decided in a court of law.

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[11] In fact, in the wake of the Tenth Circuit's ruling, the DMA pursued its claims in state court, securing a preliminary injunction against the law, while also seeking review of the Tenth Circuit's ruling concerning the scope of the TIA.

Joseph Story, in his famous Commentaries on the Constitution of the United States, § 1685 (1833), recognized the significance of the perception of fairness in our courts, separate from any issue regarding equal treatment of domestic and out-of-state parties:

> It would require an uncommon exercise of candour or credulity to affirm, that in cases of this sort all the state tribunals would be wholly without state prejudice, or state feelings; or, that they would be as earnest in resisting the encroachments of state authority upon the just rights, and interests of the citizens of other states, as a tribunal differently constituted, and wholly independent of state authority. And if justice should be as fairly and as firmly administered in the former, as in the latter, still the mischiefs would be most serious, if the public opinion did not indulge such a belief. Justice, in cases of this sort, should not only be above all reproach, but above all suspicion.

This Court, from its earliest days, has expressed similar concern over the potential "fears and apprehensions" of out-of-state parties who seek justice in state courts. In *Bank of the United States v. Devaux*, 9 U.S. (5 Cranch) 61, 87 (1809), Chief Justice Marshall wrote:

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

There is a necessary balancing of competing interests when Congress acts to restrict access to federal courts over certain categories of cases. Such considerations were clearly involved in enactment of the TIA:

> In short, in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority. Nowhere does the legislative history announce a sweeping congressional direction to prevent "federal-court interference with all aspects of state tax administration."

Hibbs, 542 U.S. at 104-05 (citation omitted).

Petitioner's federal court action neither questions nor disturbs the TIA's primary objective – preventing taxpayers from bypassing state procedures for protesting tax assessments or seeking refunds of taxes paid. The DMA's members are not taxpayers and they are not protesting any tax liability. They do, however, fall precisely within that category of out-of-state parties who might reasonably lack confidence in the impartiality of a state tribunal, even if that apprehension is not warranted.

Whether the grant of federal jurisdiction is based on diversity or federal question, the avoidance of any appearance of discrimination against out-of-state parties is of critical importance. This was stated well by former Acting Solicitor General Walter Dellinger:

> Diversity jurisdiction was designed not only to diminish the risk of uneven justice, but also to protect the reputation of our courts – "to shore up confidence in the judicial system by preventing even the appearance of discrimination in favor of local residents."

Walter Dellinger, "The Class Action Fairness Act: Curbing Unfairness and Restoring Faith in our Judicial System," at 4, *Public Policy Institute* (Policy Report March 2003) (citation omitted) (available at www.dlc.org/documents/Class_Action_0303.pdf).

An enlarged reading of the TIA would, instead, produce the very "fears and apprehensions" on the part of non-residents that Chief Justice Marshall warned against.

IV. THE DOCTRINE OF COMITY DOES NOT APPLY.

Analysis of federal court jurisdiction under the TIA is sometimes supplanted through reference to the "more embracive" doctrine of comity, discussed by the Court in *Levin*. 560 U.S. at 424. That is not the case here. The Tenth Circuit alluded to comity, in a footnote, as an additional factor that "militates in favor of dismissal" of the DMA's claims (Pet.App. at A-33 n.11), but the doctrine of comity does not apply. Neither the purpose of the comity doctrine, nor its application in *Levin*, dictate the dismissal of the DMA's suit.

A. The Executive Director Did Not Raise Comity Below.

Comity is a prudential doctrine. *Id*. at 432. "If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the state system." *Id*. (*citing Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 480 (1977)). The Executive Director did not seek dismissal of the DMA's Commerce Clause claims in either the district or appellate court on jurisdictional or comity grounds. In her opposition to the DMA's petition for certiorari, the Executive Director explained that she "agreed to seek an expedited ruling on the merits of the Commerce Clause challenge" because she was advised other states were considering similar legislation. Opp. to Pet. for Cert. at 5-6 n.1. The Executive Director thus either believed that comity was not a bar to the district court ruling on the merits, or she elected to proceed in the federal forum to avoid the delays associated with refiling the action in state court. In either case, the Court need not address the comity issue now. *See Hodory*, 431 U.S. at 480 (court not required to decline jurisdiction where the state either agreed that abstention was not required, or chose to proceed in federal court in order to avoid protracted state proceedings).

B. The DMA's Claims Present None Of The Concerns Relevant To Comity In State Tax Cases.

Comity is not a bar to the DMA's claims in any case. The principle of comity from which the TIA derives is "a reluctance to interfere by prevention with the fiscal operations of state governments." *Fair Assessment*, 454 U.S. at 108 (*quoting Boise Artesian Water Co. v. Boise City*, 213 U.S. 276, 282 (1909)). This principle applies with "particular force" in the area of state taxation, for the reasons described cogently in *Great Lakes* and serves the same purpose, *i.e.*, to preclude jurisdiction over challenges to state taxes that deviate from established procedures for determining and collecting state tax liability. 319 U.S. at 301. But in a case challenging non-tax matters, whose stated aim is to encourage a hoped-for increase in voluntary tax reporting, the interests served by comity are not at stake.

The significance of comity in state tax matters was articulated by Justice Brennan in *Perez v. Ledesma*:

> [I]f federal [equitable relief] were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts.

401 U.S. 82, 127 n.17 (concurring in part and dissenting in part). None of the concerns expressed by the Court as resting at the core of the comity principle are presented by this case. The DMA's suit does not seek to "test [a] state tax assessment," nor can its affected, out-of-state members be subject to Colorado use tax assessments. There are no "ordinary procedural requirements" akin to state tax appeal procedures for contesting the notice and reporting provisions, and thus the DMA's membership "escapes" none of them. The Colorado statute does not impose a collection obligation upon non-collecting retailers, and the notice and reporting obligations in no way constitute "the collection of revenue" by the Department. The DMA's suit will no more obstruct these non-tax, regulatory measures than would a declaratory judgment action in state court (as the DMA's pending state action shows). There is no more

danger of damage to the State's budget, and no more increased risk of taxpayer insolvency, that arises from the DMA seeking redress in federal court. Nor are there any disputed questions of state tax which are better reserved to the state courts to answer. The DMA challenges the Colorado Act on its face. In sum, even if one accepts that the Colorado Act implicates state tax collection concerns, the DMA's suit causes no unusual "disarray" in the administration of the State's taxes. Just as this case is "a poor fit under the TIA, so it [is] a poor fit for comity." *Levin*, 560 U.S. at 430 (brackets added).

C. The *Levin* Factors Are Absent Here.

The Court's recent decision in *Levin* illustrates further the inapplicability of the doctrine here. *Levin*, found that a "confluence of factors," taken together, dictated dismissal, on comity grounds, of a suit alleging discriminatory treatment of a group of "independent marketers" under Ohio's system for the taxation of natural gas. *Id.* at 431. *First*, the Court noted that there was no fundamental Constitutional right or classification subject to heightened scrutiny involved in the taxpayers' challenge. *Id. Second*, by complaining about their relative tax burden in comparison to their competitors, the plaintiffs were seeking to enlist the federal courts to improve their competitive position in the Ohio market. *Id. Third*, Ohio courts were "better positioned than their federal counterparts" to correct any unconstitutional discrimination resulting under state law, and were not limited by the TIA, as a federal district court would be, in the remedy it could prescribe. *Id.* at 431-32. The Court concluded that "[i]ndividually, these considerations may not compel forbearance on the part of federal district courts; in combination, however, they demand deference to the state adjudicative process." *Id.* at 432.

The Court placed particular emphasis on the third factor as central to the comity analysis, *i.e.*, the existence of alternative possible remedies to achieve equal treatment under the law, pending correction by the state legislature. *Id.* at 427-28. The Court explained that it has traditionally left to state courts upon remand the determination of what form of relief is preferable to remedy unlawful discrimination resulting from unconstitutional state statutes. *Id.* Lower federal courts, however, lack the power to send cases to state courts for decision on the proper remedy, and thus comity principles suggest that federal district courts must refrain from exercising jurisdiction in the first place, where a state court forum is available to plaintiffs. *Id.* at 428.

The principles enunciated by the Court in *Levin* do not lead to the conclusion that the district court in the present case was required to refrain from exercising its jurisdiction over the DMA's suit as a matter of comity. Most significantly, there is no remedy other than enjoining enforcement of the Colorado Act's notice and reporting requirements available in response to the DMA's claims. Extending such obligations to in-state, Colorado retailers would be nonsensical, since sales tax collection at the point-of-sale renders use tax reporting by the consumer unnecessary. Nor would such an illogical approach cure the violation alleged by the DMA in Count II, *i.e.*, that the State lacks the power under the Commerce Clause to impose the notice and reporting obligations on out-of-state retailers with no physical presence in the state. *See* C.A. App. at 65-67. In short, "[b]ecause state courts would have no greater leeway than federal courts to cure the alleged violation, nothing would be lost in the currency of comity or state autonomy by permitting" the DMA's claims to be litigated in federal court. *Levin*, 560 U.S. at 431.

Moreover, the other factors identified by the Court in *Levin* are not present here. The DMA is not seeking to enlist the federal courts to "increase a competitor's tax burden." *Id.* at 426. The DMA's affected members are true "outsiders" to the tax. *Id.* at 430. The DMA's suit will not, in any respect, alter the tax collection obligations of other retailers, in-state and out-of-state alike, that are required to collect Colorado sales and use taxes. Rather, the DMA's suit seeks to protect its members from discriminatory regulatory obligations. Finally, although Commerce Clause rights are not typically considered to be among those classified as "fundamental," discrimination against interstate commerce triggers a form of heightened scrutiny so strict as to result in a virtual *per se* rule of unconstitutionality. *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 99 (1994). Such heightened scrutiny militates against declining jurisdiction on comity grounds. *See Levin*, 560 U.S. at 426 (commenting that comity requires deference to states with regard to economic legislation that "does not employ classifications subjected to heightened scrutiny or impinge on fundamental rights"). In short, comity is not a bar to the DMA's suit.

◆

CONCLUSION

The decision of the Tenth Circuit Court of Appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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September 9, 2014

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CONGRESSIONAL RECORD – SENATE

February 19, 1937

COLLECTION OF STATE TAXES – JURISDICTION OF FEDERAL DISTRICT COURTS

Mr. BONE. Mr. President, on the 17th of the present month I introduced a very short bill, to amend section 24 of the Judicial Code. The proposed amendment would affect the jurisdiction of district courts of the United States over suits relating to the collection of State taxes.

In view of the fact that the jurisdiction of the lower Federal courts has been under discussion during the last few days, I think this is a proper time to bring the bill forward, and I hope that the Committee on the Judiciary of the Senate will give it the attention I think it merits.

I introduced the bill primarily because it affects my own State, but I dare say that almost to the degree it would affect my State, it would affect the States of other Senators. The purpose of the bill is to take away the jurisdiction of Federal district courts to enjoin, suspend, or restrain the assessment or collection of any tax imposed by or pursuant to the laws of any State. Provision is made that the bill is not to affect suits pending at the time of its enactment.

I digress to call attention to the fact that even if this bill shall be enacted it will not affect the litigation now under way in the courts in my State, or in the courts in any other State.

At this point I ask unanimous consent that the bill to which I refer, Senate bill 1551, be inserted in my remarks, so that those who read them may know the nature of the bill.

The PRESIDING OFFICER. Is there objection?

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

> A bill to amend section 24 of the Judicial Code, as amended, with respect to the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes.
>
> *Be it enacted, etc.*, That the first paragraph of section 24 of the Judicial Code, as amended, is amended by adding at the end thereof the following: "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."
>
> SEC. 2. The provision of this act shall not affect suits commenced in the district courts, either originally or by removal, prior to its passage; and all such suits shall be continued, proceedings therein had, appeals therein taken, and judgments therein rendered, in the same manner and with the

> same effect as if this act had not been passed.

EXAMPLES OF SIMILAR LEGISLATION

Mr. BONE. Mr. President, the proposed legislation is not novel in character.

Section 3224 of the Revised Statutes provides that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." This provision applies only to taxes levied by the Federal Government. State Railroad Tax Cases, 92 U.S. 575.

An act of March 4, 1927, provides that "No suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the district court of the United States for Puerto Rico."

The Johnson Act of May 14, 1934, after which this bill is modeled provides that –

> no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or in the repugnance of such order to the Constitution of the United States,

> where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state.

Most of the arguments which were used in support of the Johnson Act and brought about its enactment apply in like manner to the legislation now proposed.

NECESSITY FOR THE LEGISLATION

The existing practice of the Federal courts to entertain tax-injunction suits make it possible for foreign corporations to withhold from a State and its governmental subdivisions taxes in such vast amounts and for such long periods as to disrupt State and county finances, and thus make it possible for such corporations to determine for themselves the amount of taxes they will pay.

While this situation exists in many of the States, the detailed information presented herewith relates only to the State of Washington.

Mr. President, at this point I desire to read brief excerpts from a letter to me from an assistant attorney general of the State of Washington dealing with the particular matter and referring to a very important piece of litigation in my own State at this time. The writer of this letter is Mr. R. G. Sharpe, assistant attorney general of my State, who says:

> (1) The statutes of Washington (ch. 61, Laws of 1931), takes away from the State courts the right to enjoin the collection of State and county taxes, unless the tax law is invalid or the property is exempt from taxation, and provides that taxpayers can contest their taxes only in refund actions after payment under protest. This law makes it possible for the State and its various agencies to survive while long drawn out tax litigation is in progress. But if those to whom the Federal courts are open may secure injunctive relief against offensive taxes, we have presented the highly unfair situation of the ordinary citizen being required to pay first and then litigate, while those privileged to sue in the Federal courts need pay only what they choose and withhold the balance during years of litigation.
>
> Pending and past tax injunction suits maintained in the Federal courts of this State serve to emphasize the point last urged. Thus, in December 1936 the Northern Pacific Railway Co. instituted in the Federal District Court at Spokane a suit to restrain a portion of the taxes levied upon that company's operating property located in 23 counties of this State for the years 1935 and 1936. The tax for 1935 is $1,401,549, of which the company has refused to pay and seeks to restrain the collection of $618,087. The tax for 1936 is $1,343,460, of which the company

has refused to pay and seeks to restrain the collection of $856,495. Thus, for these 2 years the company is seeking to enjoin the collection of $1,474,582, or more than half of its taxes. From the history of past similar litigation it is quite apparent that the company will refuse to pay any of these unpaid taxes until the end of the litigation several years hence, and will likewise prosecute similar actions against the counties for the taxes for future years and will likewise withhold large proportions of its taxes for these later years. And it is likewise more than likely that other roads will institute similar suits and follow the same practice.

In this, history will but repeat itself, as shown by the records of the same Federal district court in similar suits begun 10 years ago. In the fall of 1925 and the beginning of 1927 the Northern Pacific and the Chicago, Milwaukee, St. Paul & Pacific Railroad (the "Milwaukee") instituted suits in the Federal court at Spokane to restrain the collection of their taxes, the N. P. for its 1925 and 1926 taxes, and the Milwaukee for its 1926 and 1927 taxes. Each year thereafter similar suits were instituted by the two companies, so that by the time decrees in the original suits were entered by the district court in September 1932 suits involving the N. P. taxes for 1926 to 1931 were pending, and suits involving the Milwaukee taxes for 1926 to 1931 were likewise pending. Later suits involving the 1932 N. P. taxes and the 1932 and 1933 Milwaukee taxes were instituted.

The 1925 and 1926 N.P. suit and the 1926 and 1927 Milwaukee suit took a year and a half to try, the trial being had before a special master, and, although every effort was made by the county defendants to press the suits to judgment, decrees were not entered in those suits, as I have said, until September 1932. By this time the counties were so hard-pressed for money by reason of these railroads withholding such a large proportion of their taxes, that the railroads, the N. P. and the S. P. & S. (another litigating road), were in a position to dictate the terms of settlement, and as a result the counties threw up their hands and by agreed decrees entered February 20, 1933, consented to a settlement of the N. P. suits, which settlements resulted in the counties receiving substantially $1,500,000 less in taxes for the years 1927 to 1932 than they would have received under the formula of valuation announced by Judge Webster in his decision of the 1925 and 1926 case. (See *N. P. Ry. v. Adams County*, 1 Fed. Supp. 163).

The Milwaukee's offer of settlement was too ridiculous to be stomached by the counties, even in their distressed financial condition, and an appeal was taken to the Circuit Court of Appeals, resulting in a reversal of the 1926 and 1927 Milwaukee tax decree, in July 1934. (See *C. M. St. P. & P. R. Co. v. Adams Co.*, 72 Fed. (2d) 816.) The tax commission thereupon made assessments of the Milwaukee property for the years 1926 to 1932, and on November 30, 1934, the Milwaukee elected to pay the taxes as so reassessed, on the 10-year installment plan. In neither the N. P. nor the Milwaukee settlement was any interest allowed on the taxes wrongfully withheld for all these years.

I am enclosing herewith a few rather startling figures with respect to these suits. In so doing, however, I have ignored the N. P. suit relating to the 1925 and 1926 taxes for the reason that the N. P. in March 1927, paid substantially all of its taxes for those 2 years, pursuant to stipulation that a judgment of refund might be entered for the excess taxes found, if any.

May I here restate a few of the figures shown by this statement:

Total taxes assessed, against N.P. 1927 to 1931, and against Milwaukee, 1926 to 1932		$22,349,469
Total of said taxes paid by said companies prior to suit		12,893,713
Total of said taxes canceled as result of Milwaukee reassessment and settlements to which counties were forced to accede	$3,576,242	
Total of said taxes wrongfully withheld and paid to counties (without interest) by N. P. on Feb. 20, 1933, and by Milwaukee on Nov. 30, 1934	5,879,514	9,455,756

Interest to which counties would have been entitled at legal rate of 6 percent on said taxes wrongfully withheld for varying periods, some as long as 7½ years	1,120,774
Interest to which counties would have been entitled on said taxes wrongfully withheld as penalty for nonpayment of delinquent taxes	1,867,956

The suit of the Northern Pacific Railway Co. now pending in Washington serves to indicate the methods used by these powerful corporations to harass the State and local governments. The attorneys for the plaintiff very astutely did not make the State or the State tax commission parties to the action, but sued the 23 counties of the State in which the railway has property collectively, the purpose being to compel the defense of the action to be handled by 23 local prosecuting attorneys who may not be familiar with the processes by which utilities are valued and assessed by the State tax commission, and who may not be experts in the field of Federal court practice.

Perhaps it should be emphasized at this point that the bill does not take away any equitable right of a taxpayer, or deprive him of a day in court. Specific provision is made that the suit will be taken out of the jurisdiction of the Federal court only if a plain, speedy, and efficient remedy may be had at law or in equity in the courts of the State. Thus a full hearing and judicial determination of the controversy is assured.

At present the foreign corporation has a choice of going into two tribunals. The advantage thus given is illustrated by the following quotation from the report of the Committee on the Judiciary on the Johnson Act:

> Indeed, the utility company may pursue these two remedies concurrently. The Supreme Court of the United States has held that State and Federal courts have concurrent jurisdiction in such cases and a utility company can proceed in both State and Federal courts until a final judgment is rendered in one of the two proceedings. This gives the utility an opportunity, as the case progresses, to ascertain the views of the State authorities and the Federal authorities and, when it once ascertains these views, and finds it will probably be defeated in one of the proceedings, it can dismiss the case in that proceeding and rely upon the other. It seems quite plain that to give the utility this advantage is unreasonable and unfair. It is likewise exceedingly expensive and always means long delay. All the expenses in the end must be borne by the people who pay the rates to the public utility company. It all comes out of the ultimate consumer.

The following quotations from the same report are also thought to be applicable to this bill in the same manner that they were applicable to the Johnson bill:

> ### LITIGATION IN FEDERAL COURTS MORE EXPENSIVE THAN IN STATE COURTS
>
> It is much more expensive to litigate in Federal courts than in State courts. Attorney fees are usually higher, and the other expenses connected with the litigation are, as a rule, many times higher in Federal court than in the State court. The wealthy individual or corporation is thus often enabled to wear out his opponent and compel him to settle or submit to an unjust judgment for the very reason that his opponent is not financially able to follow him through the tortuous and expensive route through the Federal court to the Supreme Court of the United States at Washington. And all the time in this dispute there is no Federal question involved. There is a dispute arising under a State statute or law of other origin and nothing more. There are many places in the United States where litigants must travel several hundred miles to attend the place of trial if they are sued in Federal court.
>
> It is not argued that the Federal court will be unjust. For the purpose of our illustration we can assume that the Federal court will be just as fair and as just as the State court. But when sued in a Federal court, the defendant will be required to take his attorneys and his witnesses long distances where

the Federal court sits. If the case is continued, they must come again. And when the case is finally decided, the poor defendant may be successful, but his opponent, because he is a nonresident, has taken him into Federal court and he appeals the case to the Federal court of appeals. Then he must send his attorneys several hundred miles to the place where the Federal court of appeals sits. This means again a very much increased expense and, in almost every case, a much larger attorney fee. He may win his case in the court of appeals, but, if so, his opponent may possibly take the case to the Supreme Court of the United States and he will have to send his attorneys perhaps a thousand or 2,000 miles, paying the expenses and again a much larger attorney fee than he would pay in the State courts.

It means, therefore, that a person taken against his will into the Federal court for the purpose of settling a State question is worn out before he reaches the end. Therefore, at the beginning, he perhaps submits to an injustice because he knows it means financial ruin to pursue the case to its final determination.

It is easy to be seen, therefore, that while perhaps there was some basis for this kind of a law when our Constitution was adopted, the purpose for which this provision of law is now used was never dreamed of by our forefathers when they adopted the Constitution. The effect of this provision of law is now entirely different from what it was then. First adopted to bring about justice, it has, as a matter of practice, very largely resulted in injustice and discrimination. Originally intended for the protection of the nonresident, it has become a weapon of destruction and injustice in his hands.

Those who favor the continuance of this unjust discrimination base their reason upon the original claim of jealousies existing between citizens of different States. But the real reason is that they want to protect the "privilege" which the law gives them. They desire to have the right in their litigation to choose between two tribunals. What was originally intended to protect them in a right has become a "privilege" which they use to give them an advantage over their adversaries.

RELIEF OF FEDERAL COURTS FROM CONGESTION

The congestion in our Federal district courts is acknowledged by all. That of itself is often a denial of justice. All classes of our citizens have recently become interested in various proposals for the relief of the congestion in our Federal district courts. The President of the United States has sent official messages to Congress on the subject. He has appointed a commission composed of eminent jurists and other able, patriotic scholars. The question has received the attention of the leading members of the bar throughout the entire country. Federal judges from the Supreme Court down have lent their assistance in trying to devise some plan by which the Federal courts can be relieved from a large amount of the work now upon Federal judicial dockets.

Why not do this by letting State courts settle State controversies and confine Federal courts to the settlement of Federal questions? When a State question arises under a State statute, why not let the courts of that State settle that controversy, whether the controversy is between citizens of one State or citizens of two different States? Why not be logical and let the State courts try controversies arising under State laws within their borders instead of permitting a few privileged persons who do business in a State to take their controversies into Federal courts and thus burden Federal judges with the settlement of State questions and control of lawsuits arising entirely and solely out of controversies under State laws?

CONSTITUTIONALITY OF PROPOSED LEGISLATION

While there are many other parts of the committee's report on the Johnson Act which are well worth rereading in connection with the consideration of the proposed legislation, there is presented here only one additional quotation, which deals with the constitutional power of the Congress to enact legislation of this type:

> The object of the legislation, as it has been distinctly stated, is to take away jurisdiction from the district courts of the United States. It is not intended to take away and does not take away any jurisdiction of the Supreme Court of the United States. The Supreme Court is the only court where jurisdiction is conferred by the Constitution. All the inferior courts – which means all the courts of the United States except the Supreme Court – obtain their jurisdiction from statute. It would be perfectly constitutional for Congress to pass an act which would abolish every Federal court in existence except the Supreme Court. All the jurisdiction which such inferior courts have has been conferred upon them by statute, and the Supreme Court of the United States has repeatedly held that it is within the power of Congress to add to that jurisdiction within the limits of the Constitution, and to take away any part or all of it.
>
> In the case of *Kline v. Burke Construction Co.* (260 U.S. 226 (1922)) the Supreme Court said:
>
> "The right of a litigant to maintain an action in the Federal court on the ground that there is a controversy between citizens of different States is not one derived from the Constitution of the United States, unless in a very indirect sense. Certainly it is not a right

granted by the Constitution. The applicable provisions, so far as necessary to be quoted here, are contained in article III. Section 1 of that article provides: "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.' By section 2 of the same article it is provided that the judicial power shall extend to certain designated cases and controversies, and, among them 'to controversies * * * between citizens of different States * * * .' The effect of these provisions is not to vest jurisdiction in the inferior courts over the designated cases and controversies, but to delimit those in respect of which Congress may confer jurisdiction upon such courts as it creates. Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the General Government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold, or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution."

This question was passed upon directly by the Supreme Court in an early day. In *Turner v. Bank of America* (4 Dall. 6, 10 (U. S. 1799)) the Supreme Court, speaking through Mr. Justice Chase, said:

"The notion has frequently been entertained that the Federal courts derived their judicial power immediately from the

> Constitution; but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this Court, we possess it, not otherwise; and if Congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, Congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the Federal courts to every subject, in every form, which the Constitution might warrant."
>
> It is perfectly clear that this bill cannot be successfully attacked on constitutional grounds. Congress in legislating on that subject, has always acted on that theory.

Since the John Act was passed, its constitutionality has been upheld in an opinion by a United States district court in Mississippi, which reviewed at length the constitutional basis for such legislation in the case of *Mississippi Power & Light Co. v. City of Jackson* (9 Fed. Supp. 564).

Mr. President, in conclusion I desire to ask of my brethren a careful consideration of this particular bill, not because it affects my State only, but because the problem raised by reason of the holding that litigants have a right to go into the Federal court and seek relief against the imposition of taxes, as in the State of Washington, is one that confronts every State in the Union. It is a problem which is challenging to every State in the Union which has tax problems confronting it.

I sincerely hope that the Committee on the Judiciary of the Senate will see fit to report this bill promptly. I think my friend the Senator from Nebraska [Mr. NORRIS] wrote a portion of the committee's report from which I have quoted.

75th Congress } **SENATE** { **Report**
1st Session } { **No. 1035**

AMENDING THE JUDICIAL CODE

July 22 (calendar day, Aug. 2), 1937. –
Ordered to be printed.

Mr. CONNALLY, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1551]

The Committee on the Judiciary, to whom was referred the bill (S. 1551) to amend section 24 of the Judicial Code, after consideration thereof, report the bill favorably to the Senate with the recommendation that it do pass.

S. 1551 amends section 24 of the Judicial Code, as amended, with respect to the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes. The bill reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the first paragraph of section 24 of the Judicial Code, as amended, is amended by adding at the end thereof the following: "Notwithstanding the foregoing provisions of this paragraph,

> no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."
>
> SEC. 2. The provisions of this Act shall not affect suits commenced in the district courts, either originally or by removal, prior to its passage; and all such suits shall be continued, proceedings therein had, appeals therein taken, and judgments therein rendered, in the same manner and with the same effect as if this Act had not been passed.

This legislation does not introduce a new principle, since the Congress has passed statutes of similar import. It is the common practice for statutes of the various States to forbid actions in State courts to enjoin the collection of State and county taxes unless the tax law is invalid or the property is exempt from taxation, and these statutes generally provide that taxpayers may contest their taxes only in refund actions after payment under protest. This type of State legislation makes it possible for the States and their various agencies to survive while long-drawn-out tax litigation is in progress. If those to whom the Federal courts are open may secure injunctive relief against the collection of taxes, the highly unfair picture is presented of the citizen of the State being required to pay first and then litigate, while those privileged to sue in the Federal courts need only pay what they choose and withhold the balance during the period of litigation.

The existing practice of the Federal courts in entertaining tax-injunction suits against State officers makes it possible for foreign corporations doing business in such States to withhold from them and their governmental subdivisions, taxes in such vast amounts and for such long periods of time as to seriously disrupt State and county finances. The pressing needs of these States for this tax money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy.

The attorney general of each of the following States has seen fit to urge passage of this bill: Alabama, California, Florida, Idaho, Illinois, Louisiana, Minnesota, Missouri, Montana, New Jersey, Oklahoma, South Dakota, Vermont, Virginia, Washington, West Virginia, and Wyoming.

It should be emphasized that the bill does not take away any equitable right of the taxpayer or deprive him of his day in court. Specific provision is made that the suit will not be withdrawn from the jurisdiction of the Federal district court except where there is a plain, speedy, and efficient remedy at law or in equity in the courts of the State. A full hearing and judicial determination of the controversy is assured. An appeal to the Supreme Court of the United States is available as in other cases.

The propriety of this kind of legislation was fully discussed by the Senate Judiciary Committee when the so-called Johnson Act of May 14, 1934, S. 752, Public, No. 222, was favorably reported and subsequently passed by the Congress.

The report on the Johnson bill pointed out that the continuance of the unjust discrimination between citizens of the State and foreign corporations doing business in such State has been the cause of much controversy. The controversies arising out of the use of the injunctive process in State tax cases would be eliminated by the passage of this bill.

The question of the constitutionality of this type of legislation was also discussed in the report on the Johnson bill, which pointed out decisions of the Supreme Court which removed any question of the right of Congress to limit jurisdiction of Federal district courts in matters of this kind. There being no question of the constitutional right of the Congress to enact such legislation, the only remaining question is that of the propriety and wisdom of such legislation. The district courts of the United States derive their jurisdiction wholly from the authority of Congress, as was clearly pointed out in *Kline v. Burke Construction Company* (260 U.S. 226 (1922)). In that case the Supreme Court held that Congress might give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. As far back as 1799 the case of *Turner v. Bank of America*, Mr. Justice Chase, speaking for the Supreme Court, laid at rest any question of the right of Congress to enact this sort of legislation.

Since the Johnson Act was passed its constitutionality has been upheld in an opinion in the United States District Court of Mississippi, which reviewed at length, the constitutional basis for such legislation in the case of *Mississippi Power & Light Company v. City of Jackson* (9 Fed. Supp. 564).

A contemplation of the wisdom and desirability of this sort of legislation rising out of the compelling needs of many States for a more prompt disposition of tax controversies of the character referred to, impels us to recommend the prompt passage of S. 1551.

75th Congress } *1st Session* }	HOUSE OF REPRESENTATIVES	{ Report { No. 1503

SUITS RELATING TO COLLECTION OF STATE TAXES

August 11, 1937. – Referred to the
House Calendar and ordered to be printed.

Mr. HILL of Oklahoma, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1551]

The Committee on the Judiciary, to whom was referred the bill (S. 1551) to amend section 24 of the Judicial Code, as amended, with respect to the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes, after consideration, report the same favorably to the House with the recommendation that the bill do pass.

The effect of this proposed legislation is to deny jurisdiction to United States district courts to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by, or pursuant to, the laws of any State where a plain, speedy, and efficient remedy may be had in the State courts of the State levying the tax.

The committee attach hereto and make a part of this report the report of the Senate Judiciary Committee on the bill.

[S. Rept. No 1035, 75th Cong., 1st sess.]

The Committee on the Judiciary, to whom was referred the bill (S. 1551) to amend section 24 of the Judicial Code, after consideration thereof, report the bill favorably to the Senate with the recommendation that it do pass.

S. 1551 amends section 24 of the Judicial Code, as amended, with respect to the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes. The bill reads as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the first paragraph of section 24 of the Judicial Code, as amended, is amended by adding at the end thereof the following: 'Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State'
>
> "SEC. 2. The provisions of this Act shall not affect suits commenced in the district courts, either originally or by removal, prior

> to its passage; and all such suits shall be continued, proceedings therein had, appeals therein taken, and judgments therein rendered, in the same manner and with the same effect as if this Act had not been passed."

In this connection the following is quoted from *Matthews v. Rodgers* (284 U.S. 521, 525-526):

> "Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a State or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the State courts, from which the cause may be brought to this Court for review if any Federal question be involved (Judicial Code, sec. 237, U.S. C., title 28, sec. 344), or to his suit at law in the Federal courts if the essential elements of Federal jurisdiction are present" (citing numerous authorities).

In compliance with clause 2a of rule XIII, existing law is printed below in roman with new matter proposed to be added printed in italic:

> Judicial Code, section 24, amended, paragraph 1 (U.S. C., title 28, sec. 41). The district courts shall have original jurisdiction as follows:
>
> First. Of all suits of a civil nature at common law or in equity, brought by the United States, or by any officer thereof

authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made. The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section. Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State. *Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.*

RESPONDENT'S BRIEF

No. 13-1032

In the Supreme Court of the United States

DIRECT MARKETING ASSOCIATION,
Petitioner,
v.
BARBARA BROHL, EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF REVENUE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF

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QUESTION PRESENTED

The Tax Injunction Act, 28 U.S.C. § 1341 (the "TIA"), provides: "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Petitioner Direct Marketing Association's ("DMA") members include Internet retailers who, under Colorado's Act Concerning the Collection of Sales and Use Taxes on Sales Made by Out-of-State Retailers (the "Collection Act"), have the choice of either (1) remitting sales and use taxes on their sales to Colorado consumers, or (2) providing those customers, and the State, with information that allows accurate assessment and payment of those taxes. DMA filed this federal suit challenging the State's authority to require Internet retailers to make that choice. The question presented is:

> Whether the TIA bars the federal courts from enjoining Colorado's efforts to assess and collect taxes it is owed through the Collection Act.

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INTRODUCTION

Even in today's Internet age, Colorado is still home to brick-and-mortar retailers. These retailers, including both local shops (like Denver's Tattered Cover Bookstore) and national chains (like Barnes & Noble) with a physical presence in Colorado must add taxes to the price of their products at checkout and remit those taxes to the State on behalf of customers who otherwise are liable for paying them. This is true for these retailers whether the sales are made in person, online, or over the phone.

Retailers with significant sales (over $100,000 annually), but no physical presence in Colorado, however, have a choice. They can either play by the same rules as in-state retailers, *i.e.*, collect and remit Colorado sales and use tax, or they can choose instead to provide their customers and the State with the information necessary to ensure those taxes are properly assessed and collected. DMA brought this suit on behalf of those of its members who object to having to do either.

To assess, levy, and collect its sales and use tax, Colorado employs a range of measures, but generally its collections depend on the self-assessment, reporting, and payment of taxes due by purchasers or retailers of goods. In this it is hardly unique: "[O]ur tax structure is based on a system of self-reporting. There is legal compulsion, to be sure, but basically the Government depends upon the good faith and integrity of each potential taxpayer to disclose honestly all information relevant to tax liability." *United States v. Bisceglia*, 420 U.S. 141, 145 (1975).

But to prevent some taxpayers, wittingly or otherwise, "from escaping taxation thus shifting heavier burdens" to others, *id.* at 146, states cannot rely on good faith and integrity alone. *See* THE FEDERALIST NO. 51 (James Madison). Even in a system of perfect good faith and integrity, tax systems would have to account for other human imperfections, including imperfect knowledge of law and fact, self-interest, and indifference. The Collection Act is Colorado's attempt to respond to this reality — without it, an estimated $172.7 million of taxes on e-commerce went uncollected in Colorado in 2012 alone. Pet.App. at A-5.

DMA sued, arguing that the Collection Act violates various constitutional rights of its members. Before Colorado had the opportunity to implement its method of assessing and collecting tax on remote sales, the federal court enjoined the State's law. The Tenth Circuit, though, recognized that the TIA removes such cases from federal courts' jurisdiction. DMA now argues that was error, regardless of the negative impact on Colorado's efforts to assess and collect taxes it is owed. The TIA does not permit federal courts to enjoin a core component of a state's taxing regime. DMA's effort to severely and artificially restrict the TIA's reach should be rejected.

STATEMENT OF THE CASE

Colorado Sales and Use Tax. Colorado enacted a sales tax in 1935 and a use tax in 1937. These taxes are complementary: sales tax occurs at the time of sale, while use tax is due on the storage, use, or consumption of property within Colorado when sales tax was not paid to a retailer. COLO. REV. STAT. §§ 39-

26-104, 39-26-202, -26-204(1).[1] The purpose of a complementary sales and use tax scheme is to make all tangible property used or consumed in the State subject to a uniform tax burden, regardless of whether it is acquired within or without the state. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 66 (1963). This Court long ago determined that when paired with a sales tax of the same rate, a use tax does not run afoul of the dormant Commerce Clause. *See Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

Like other States, Colorado requires retailers with a physical presence in the state to collect sales taxes from purchasers at the time of the transaction. These retailers must comply with a series of requirements: for example, they must obtain a license; calculate the State and local tax due, including any tax exemptions; collect the tax; file a return; remit the tax to the State; and maintain various records. *See* COLO. REV. STAT. §§ 39-26-101 to -129. Retailers are further required to hold in trust any sales taxes they collect: the funds "shall be and remain public money, the property of the state of Colorado, in the hands of such retailer, and he shall hold the same in trust for the sole use and benefit of the state of Colorado" until paid to the Colorado Department of Revenue (the "Department"). *Id.* § 39-

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[1] Since DMA filed its suit in 2010, Colorado has amended its sales and use tax collection laws, but not in any way that affects the claims presented here. The sections of the Colorado Revised Statutes cited herein are the same in all material respects in the current statutes. *See* H.B. 13-1295, 69th Leg., 1st Sess. (Colo. 2013) (adopted in preparation for potential federal Marketplace Fairness Act, which has not been adopted); H.B. 14-1269, 69th Leg., 2nd Sess. (Colo. 2014) (addressing sufficient physical presence for collection of sales and use tax).

26-118(1). If retailers do not collect the tax from their purchasers, they are themselves liable for any sales and use tax due on the transaction. *Id.* § 39-26-105. Retailers who fail to collect and remit the tax may also be subject to fines and criminal penalties. *Id.* §§ 39-21-118(2), 39-26-204(4), (5).

***Bellas Hess* and *Quill*.** As a result of two decisions from this Court, sales and use tax *collection* may only be required of retailers with a physical presence in the state. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); *Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967). National retailers with locations in Colorado, like Home Depot or Target, must collect and remit sales and use tax not only on in-store purchases, but also on online and other remote sales. In contrast, Internet and mail-order companies that may have a substantial electronic presence but no physical presence in Colorado, like Amazon.com, are not required to do so.

Despite their advantaged status under *Bellas Hess* and *Quill*, many Internet retailers nevertheless choose to voluntarily collect and remit Colorado sales and use tax. Of the Internet retailers listed in the publication *Top 500 Internet Retailers*, at least 39 do not have a physical presence in Colorado but still elect to collect and remit Colorado sales and use tax. C.A. App. 1932-33. Some Internet-only retailers, however, do not volunteer. Of course, their customers remain liable and must self-assess any tax they owe by filing a return and remitting the tax to the State. COLO. REV. STAT. §§ 39-26-202(1), -204(1). But because few people carefully track their online purchases or pay attention to whether they already paid sales taxes due on transactions made over the course of a year, self-reporting has proven to be an ineffective means of tax collection. J.A. 28-30.

The Impact of *Quill* on State Tax Revenue in the e-Commerce Age. Retail technology has evolved dramatically since this Court decided *Bellas Hess* and *Quill*. In 1967, annual sales by the national mail-order industry were $2.4 billion. *Bellas Hess*, 386 U.S. at 763. Twenty-five years later, when this Court decided *Quill*, that number had ballooned to $180 billion. 504 U.S. at 329. Today, with the addition of e-commerce, remote sales have grown exponentially. In 2000, e-commerce saw annual sales of $1.06 trillion; by 2008, that number had nearly tripled to $3.16 trillion. J.A. 28.

For two reasons, states' tax collection efforts have not kept pace. First, the states' primary method of tax collection has been off-limits for a significant portion of the industry: retailers without a physical presence in a state are not required to collect and remit taxes. Second, voluntary compliance is weak. J.A. 28-30. The vast majority of purchasers, whether unknowingly or willfully, fail to pay taxes if they are not collected at the time of sale. *See id.* A 2009 analysis estimated that uncollected sales and use tax related to e-commerce nationally would grow to $11.4 billion. Donald Bruce, William F. Fox & LeAnn Luna, *State and Local Sales Tax Revenue Losses from e-Commerce*, 50 ST. TAX NOTES 537, 540 (2009).

This exponential growth in lost tax revenue has caused significant damage to Colorado's fiscal situation. Sales and use tax collections historically account for one-third of Colorado's general fund. J.A. 112. And although taxable e-commerce transactions are growing, sales and use tax revenue collection in Colorado *decreased* from 2008 to 2010. J.A. 113. This decrease occurred amidst the national recession, when Colorado's budget shortfalls totaled $5.2 billion. J.A. 110. These shortfalls affected a wide range of government programs, from K-12 and higher education to Medicaid. J.A. 111-12. The shortfalls also came at a critical time: when the economy falters, the demand for services goes *up*, increasing the public's need for government services and increasing the demands on Colorado's budget. J.A. 112. A 2010 report estimated that Colorado state and local governments would lose more than $170 million in 2012 alone due to residents' failure to pay sales or use tax on e-commerce purchases from out-of-state, non-collecting retailers. J.A. 30.

Colorado's Response. Colorado responded to this growing problem in 2010 by enacting the Collection Act ("Act Concerning the Collection of Sales and Use Taxes on Sales Made by Out-of-State Retailers"). Colorado's tax collection program gives non-collecting retailers (typically, remote, out-of-state retailers) the choice between collecting the sales and use tax – just like in-state retailers and national retailers with a physical presence – or complying with three information reporting requirements. Pet.App. E-1–E-4. Those three reporting requirements are as follows:

- **The Transactional Notice:** First, non-collecting retailers must notify purchasers that they may be subject to Colorado's use tax. COLO. REV. STAT. § 39-21-112(3.5)(c)(I); 1 COLO. CODE REGS. § 201-1:39-21-112.3.5(2). Other States have enacted similar transactional notice requirements. *See, e.g.*, KY. REV. STAT. ANN.

§ 139.450 (2014); OKLA. STAT. ANN. tit. 68, § 1406.1 (2014).

- **The Annual Purchase Summary:** Second, non-collecting retailers must send Colorado purchasers who buy more than $500 from the retailer an annual summary listing dates, general categories, and amounts of purchases, and reminding them of their use tax obligation. COLO. REV. STAT. § 39-21-112(3.5)(d)(I) ; 1 COLO. CODE REGS. § 201-1:39-21-112.3.5(3). At least one other State has enacted similar annual purchase summary provisions. *See* S.C. Code Ann. § 12-36-2691(E)(3).
- **Customer Information Report**: Third, non-collecting retailers must send an annual report to the Department listing purchaser names, addresses, and total amounts spent. COLO. REV. STAT. § 39-21-112(3.5)(d)(II); 1 COLO. CODE REGS. § 201-1:39-21-112.3.5(4). The Customer Information Report allows the Department to engage in its normal audit and enforcement functions.

Modeled after third-party information returns like IRS Forms W-2 and 1099, Colorado's Collection Act will increase voluntary self-assessment by providing purchasers with the information they need to pay their taxes. It also encourages compliance because purchasers know that the seller has reported taxable activity to the Department. *See generally* Leandra Lederman, *Reducing Information Gaps to Reduce the Tax Gap: When is Information Reporting Warranted?*, 78 FORDHAM L. REV. 1733, 1738-39 (March 2010) (comparing third-party information reporting to red light cameras, which "spur[s] compliance in the first instance"). The U.S. Treasury Department's research confirms this commonsense notion – taxpayer compliance increases dramatically when a third party reports taxable activity to the taxing authority. J.A. 43. As a result, the IRS and Treasury have implemented additional information reporting regimes in recent years. J.A. 44 (describing information reporting requirements for organizations that process credit and debit card payments and for brokerage firms regarding securities transactions).

Implementing the Collection Act. Colorado has made compliance with the Collection Act as easy as possible, which may be satisfied in a number of ways. C.A. App. 1937. For example, retailers may satisfy the Transactional Notice requirement through an online popup window at the time of an online purchase, by including the notice in a packing slip, or through other methods. C.A. App. 1941, 1964-66. The Department has also provided sample language and templates for the Transactional Notice and Annual Purchase Summary, reducing the burden on retailers. C.A. App. 1974-79. Likewise, the Department has provided easy-to-follow submission guidelines for the Customer Information Report. C.A. App. 1980-87.

None of these reporting requirements entail collection or creation of new data. Retailers *already* maintain data for the Annual Purchase Summary and Customer Information Report in their books. C.A. App. 1948-49, 1969. As the record shows, retailers track and maintain purchasing data in very detailed ways. C.A. App. 1943-45.

Colorado's law is also narrowly drawn. Retailers with less than $100,000 in gross annual sales in Colorado are exempt, meaning the vast majority of retailers in the country are exempt. 1 COLO. CODE REGS. § 201-1:39-31-112.3.5(1)(a)(iii)-112.3.5(4); C.A. App. 1940-41. DMA's own expert estimated that retailers would have to create reports for fewer than 20% of Colorado purchasers, and the percentage could be as low as 10%. C.A. App. 1970.

The burdens are well worth the cost of compliance. The estimated annual revenue associated with the Collection Act was initially estimated to be $12.5 million for fiscal year 2011-12 and is expected to increase over time as awareness of Colorado's law and enforcement increases. J.A. 117. The Collection Act is estimated to eventually close the State's ballooning sales and use tax gap by 60%. *Id.*

Proceedings Below. DMA filed this lawsuit in the United States District Court for the District of Colorado and moved for a preliminary injunction based solely on its claims under the Dormant Commerce Clause. C.A. App. 84-114. Following limited factual discovery, the district court issued a preliminary injunction. Pet. App. C-1–C-17. The district court later granted summary judgment to DMA on the same claims and permanently enjoined the Department from collecting the sales and use tax via the Collection Act. Pet.App. B-1–B-25.

On appeal, the Tenth Circuit vacated the district court's judgment based solely on jurisdiction. The court of appeals rejected DMA's argument that the TIA is limited to taxpayer lawsuits, Pet.App. A-12–A-16, and held the TIA deprived the district court of jurisdiction to enjoin Colorado's tax collection effort. Pet.App. at A-3.

While DMA's petition for certiorari to this Court was pending, DMA filed a state court case against the Department, asserting nearly identical claims. On February 18, 2014, the state district court preliminarily enjoined Colorado's Collection Act. The parties initiated discovery and were in the midst of briefing cross motions for summary judgment when this Court granted certiorari. The state district court stayed further proceedings pending resolution of this appeal.

SUMMARY OF THE ARGUMENT

Under the TIA, "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. §1341. Because DMA does not challenge the availability of a plain, speedy and efficient remedy in Colorado state court, the only question is whether DMA's lawsuit seeks to enjoin or restrain the assessment or collection of any tax under State law. The answer is yes.

DMA seeks to enjoin Colorado's core method of collecting state sales and use taxes on purchases made via the Internet and other remote means. This suit is not merely a challenge to a "secondary aspect of tax administration," as DMA argues. DMA Br., p.47. In the wake of *Quill*, the Collection Act is the only method the State has devised to ensure payment of sales and use taxes on a growing class of transactions that otherwise largely escape assessment and collection. Colorado's

Collection Act is far from speculative or untested — a similar model has been critical to the high level of compliance with the federal income tax. Here, in particular, the Transactional Notice and Annual Purchase Summary promote compliance by arming taxpayers with information necessary to accurately self-assess and pay their taxes. Meanwhile, the Customer Information Report allows the Department to engage in its normal audit and enforcement functions. Enjoining the Collection Act would therefore actually restrain the assessment and collection of Colorado's use tax.

DMA's lawsuit falls within the plain text of the TIA. It cannot reasonably be disputed that the first prong of the TIA is satisfied based on the fact that the district court "enjoined" and "restrained" Colorado's Collection Act. DMA's lawsuit also satisfies the second prong of the TIA, because Colorado's law is aimed at the "assessment" and "collection" of a state tax. The court of appeals was correct: under the TIA, tax "collection" logically includes Colorado's regime of reporting, self-assessment, and payment.

This Court's precedent recognizes that the text, history, and purpose of the TIA require a broad application of this jurisdictional bar to federal suits that would enjoin state revenue-collection measures. Congress designed the TIA as a "broad prophylactic" prohibition against federal court interference in the administration of state tax laws. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 524 (1981). Indeed, this Court has expressly warned that "federal courts must guard against interpretations of the [TIA] which might defeat its purpose and text." *Arkansas v. Farm Credit*

Servs. of Cent. Ark., 520 U.S. 821, 827 (1997). DMA's strained and disjointed interpretation of the TIA would do just that.

DMA's attempt to expand the limited exception in *Hibbs v. Winn*, 542 U.S. 88 (2004), such that the TIA does not apply to suits brought by "non-taxpayer" plaintiffs should be rejected. This reading cannot be reconciled with the TIA's text or its purposes. Moreover, DMA's members are not "outsiders" to the state's compensatory sales and use tax scheme. Such attempted distinctions elevate form over substance and invite artful pleading not permitted by the TIA.

Affirming the Tenth Circuit's decision will not create an unwarranted expansion of the TIA. There is much room between DMA's suggested extremes: this Court need not limit the TIA only to suits brought by taxpayers contesting their own tax liability, and neither must the Court apply the TIA to any suit challenging all aspects of state tax administration. Instead, the Court should read the TIA according to its plain meaning. Federal suits challenging a state's chosen method of tax assessment and collection are jurisdictionally barred. Applying the TIA here furthers Congress's purpose of protecting the primacy of state court review of challenges to state tax assessment and collection regimes.

Finally, DMA's lawsuit is also barred for a second, independent reason — comity. Even where the TIA may not apply, "principles of federal equity may nevertheless counsel the withholding of relief." *Rosewell*, 450 U.S. at 525 n.33. The comity doctrine is "[m]ore embracive than the TIA" and operates to "restrain[ ] federal courts from entertaining claims for relief that risk disrupting state tax administration." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 417 (2010). DMA's lawsuit presents that very risk here. Accordingly, comity considerations "demand deference to the state adjudicative process." *Id.* at 416.

ARGUMENT

I. The Tax Injunction Act bars DMA's lawsuit because it seeks to enjoin and restrain the methods Colorado uses to assess and collect its sales and use taxes.

DMA's lawsuit seeks to deny the State of Colorado the tools it needs to assess and collect its sales and use taxes. The TIA deprives federal courts of jurisdiction to hear such an action. The lawsuit seeks to "enjoin . . . or restrain" the State from being able to "assess[ ] . . . or collect[ ]" its taxes; it thereby interferes with "the imperative need of a State to administer its own fiscal operations." *Rosewell*, 450 U.S. at 522 (quotation omitted). Contrary to DMA's suggestion, *Hibbs* did not limit the TIA's jurisdictional bar to suits brought by taxpayers seeking to avoid their own state tax liability. Moreover, DMA's members are not "outsiders" to the state's compensatory sales and use tax scheme. DMA's effort to artificially limit the scope of the TIA and thereby enable significant federal interference with state tax systems should be rejected.

A. DMA challenges the central method by which Colorado seeks to collect the taxes owed on Internet and other remote sales.

The purpose of Colorado's sales and use tax regime is to collect taxes. The Collection Act is an important part of that regime — it is Colorado's chosen method for ensuring reporting and payment of taxes on a growing class of transactions that largely escape assessment and collection without it. No party seriously disputes that the Collection Act significantly increases Colorado's collection of taxes. The primary premise of DMA's argument, that the Collection Act comprises only "non-tax, regulatory measures" that are merely a "secondary aspect of state tax administration," is simply inaccurate. Through this suit, DMA is attempting to have the federal courts interfere with an important method by which Colorado assesses and collects taxes on sales in Colorado by retailers without a physical presence in the State. The Collection Act is no more "secondary" than the federal requirement that payments to independent contractors be remitted on a Form 1099-MISC to the IRS and the contractor.

At both the federal and state levels, self-assessment and voluntary payment are an integral part of collecting tax revenue. In the federal income tax system, for example, taxpayers are responsible for "comput[ing] the tax due and then fil[ing] the appropriate form of return along with the requisite payment." *United States v. Galletti*, 541 U.S. 114, 122 (2004). The same is true of Colorado's sales and use tax system. *See, e.g.*, COLO. REV. STAT. §§ 39-26-105 (requiring retailers to file returns and remit sales tax) and 39-26-204(1), (2) (requiring filing of returns by purchaser or retailer, as applicable, with payment of tax owed). This Court has acknowledged the vital importance of the self-regulatory aspects of these tax systems. *See Bisceglia*, 420 U.S. at 145; *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 60 (1974); *Comm'r v. Lane-Wells Co.*, 321 U.S. 219, 223 (1944).

But, as the Court has also recognized, imposing a tax without any means of determining who owes how much "would be to ignore [ ] reality." *Bisceglia*, 420 U.S. at 145. The Court therefore has consistently upheld the use of compulsory tax compliance methods, like subpoenas, investigations, and audits. *United States v. Euge*, 444 U.S. 707, 711 (1980); *United States v. Arthur Young & Co.*, 465 U.S. 805, 816 (1984). These methods no doubt incentivize voluntary taxpayer compliance. Self-assessment coupled with third-party verification has been highly successful in the federal income tax context. The "vast majority" of tax revenue is collected from taxpayers who self-assess and remit. *See* J.A. 37 (citing estimated 84% compliance rate). The taxing authority's investigatory tools serve as "a crucial backstop in a tax system based on self-reporting." *United States v. Clarke*, 134 S. Ct. 2361, 2367 (2014). DMA's suit would allow Colorado to retain its sales and use tax, but remove from it the crucial information necessary to assess and collect it.

In the sales and use tax context, retailers have traditionally played a central role in the tax assessment and collection system. States have long required retailers doing business in the state to collect sales and use tax from their customers and to remit the taxes to the state. *See, e.g., Nat'l Geographic Soc'y v.*

Cal. Equalization Bd., 430 U.S. 551, 555 (1977) (discussing necessity of imposing this tax collection burden on retailer and stating "the impracticality of its collection from the multitude of individual purchasers is obvious") (citing *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 343 (1954)). The states' authority to impose this tax collection duty on retailers is well settled. *See, e.g., Scripto, Inc. v. Carson*, 362 U.S. 207, 212 (1960) (stating imposition of such duty is "a familiar and sanctioned device") (quoting *Gen. Trading Co. v. State Tax Comm'n*, 322 U.S. 335, 338 (1944)). As a result of *Quill* and *Bellas Hess*, however, remote retailers have been removed from their traditional role as collecting agents of the state.

This "*Quill* exception" has placed the states in a tough spot. Taxable transactions via e-commerce have skyrocketed, but states' tax collections have not kept pace because remote retailers are exempt under *Quill* from the requirement to collect and remit the taxes. But pure self-assessment and self-payment, without any third-party reporting, is ineffective. *See* J.A. 28-30, 43. Without aggregate information on Internet and remote purchases, it remains very difficult for consumers to self-assess, file returns, and pay the taxes they owe. Consumers may not have retained records of their Internet purchases and may have lost track of whether or not they paid tax at checkout. Likewise, state taxing authorities lack information to perform their standard audit and enforcement functions. As this Court has recognized, it is critical not just that a state obtain "tax information in some form"; it is equally important that the information is of "such uniformity, completeness, and arrangement that the physical task of handling and verifying returns may be readily accomplished." *Lane-Wells Co.*, 321 U.S. at 219, 223.

Colorado's Collection Act fills the void. It constitutes a reasonable response to the dramatic loss of tax revenue caused by the confluence of the *Quill* exception and the reality of growing e-commerce. Pet.App. E-1–E-4. The Transactional Notice and Annual Purchase Summary provided to purchasers promote compliance with and payment of the use tax by arming them with the information necessary to accurately self-assess and pay the tax owed. Similar to federal information returns like the W-2 and 1099, the Customer Information Report filed with the Department allows the matching of information provided by retailers and purchasers to determine the proper amount of tax assessed. The Collection Act thus enables both self-assessments and voluntary remittance performed by purchasers, as well as compulsory audits, assessments, and collections initiated by the Department.

Since the Collection Act is an integral part of the State's tax collection system, DMA's suit is precisely the type of challenge that the TIA withdraws from federal court jurisdiction.

B. The plain text of the Tax Injunction Act bars DMA's suit.

The TIA by its terms applies to any federal suit that seeks to "enjoin, suspend or restrain the assessment, levy or collection" of any state tax. 28 U.S.C. § 1341. Because DMA seeks, and obtained, an injunction, little doubt exists that the TIA's first prong ("enjoin, suspend or restrain") is satisfied. In addition to seeking the precise equitable relief named in the TIA, the Tenth

Circuit correctly interpreted the term "restrain" to encompass DMA's requested relief. Since the term "restrain" is not defined in statute, the court of appeals reasonably construed the term according to its ordinary meaning, which is to "limit, restrict, or hold back." Pet.App. A-17. (citing dictionary definitions); *see FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1182 (2011) (stating that when statute does not define term, it is typically given its ordinary meaning). Either way, taken apart or together, DMA's lawsuit fits comfortably within the TIA's first operative phrase. DMA appears to acknowledge as much. DMA Br., pp. 31-32 (stating that first phrase is "properly interpreted to encompass all forms of equitable relief that might prevent state officials from carrying out the 'assessment, levy or collection' of a state tax").

DMA's challenge also satisfies the TIA's second prong ("assessment, levy, or collection of any tax under State law") because the Collection Act represents an integral facet of both the "assessment" and "collection" of Colorado's sales and use tax. Taken apart or together, the terms "assessment" or "collection" apply to the target of DMA's injunction.

Generally speaking, the term "assessment" refers to the calculation or recording of a tax liability. *Galletti*, 541 U.S. at 122. As used in the TIA, "assessment" is "closely tied to the collection of tax," and has a "collection-propelling function." *Hibbs*, 542 U.S. at 101-02. In other words, assessment leads to collection. The first step of the assessment process varies depending in part on the type of tax at issue. For example, property taxes are often assessed in the first instance by the taxing authority, while income tax begins with a self-assessment. *Id.* at 100 n.3. In the income tax context, if the taxing authority rejects a self-assessment, it then calculates the proper amount of liability and records that number in its books as its assessment. *See Galletti*, 541 U.S. at 122. In the traditional sales tax context (and in the pre-*Bellas Hess* use tax context), a different method of assessment applies. The tax is calculated — that is, assessed — at the outset not by the taxing authority or by the purchaser who owes the tax, but rather by the retailer who then collects the tax from the purchaser at the point of sale and remits it to the State. *See* COLO. REV. STAT. § 39-26-105.

Nor does the TIA define the term "collection," and this Court has not yet opined on the term's limits. In general, to "collect" means "to bring together into a band, group, assortment or mass" or "to receive, gather, or exact from a number of persons or other sources." Webster's International Dictionary 444 (3d ed. 2002). Thus, any injunction that blocks a state's effort to receive or extract tax payments is contrary to the TIA's language.

By seeking to enjoin or restrain operation of Colorado's Collection Act, DMA asked a federal court to enjoin or restrain the State's "assessment" and "collection" of its use tax. Under any tax system, an "assessment" — the predicate to "collection" — requires the identity of a taxpayer and a calculation of the taxes owed. By enjoining Colorado's law, the district court deprived Colorado of both necessary elements of that equation and thus enjoined and restrained the assessment and collection of sales and use taxes themselves.

In the most analogous case to date, *Blangeres v. Burlington Northern, Inc.*, 872 F.2d 327 (9th Cir. 1989), the Ninth Circuit held the TIA bars an employee suit seeking to enjoin an employer from producing earnings records and other tax-related information to state taxing authorities. The TIA applied because the suit, if successful, would have rendered the states "unable to obtain the information necessary for [tax] assessment." *Id.* at 328. It was of no consequence that the requested injunction would restrain assessment "indirectly rather than directly." *Id*; *accord Gass v. County of Allegheny*, 371 F.3d 134, 136 (3d Cir. 2004) (holding TIA barred lawsuit challenging state-tax appeals procedure because "appeal process is directed to the . . . ultimate goal and responsibility of determining the proper amount of tax to assess"); *Amos v. Glynn County Bd. of Tax Assessors*, 347 F.3d 1249, 1255 (11th Cir. 2003) (finding it "undisputed" that a challenge to a method of assessing property value would restrain state's tax assessment scheme, thus triggering TIA); *RTC Commercial Assets Trust 1995-NP3-1 v. Phoenix Bond & Indem. Co.*, 169 F.3d 448, 454 (7th Cir. 1999) (holding TIA "withdraws federal jurisdiction even over actions that would indirectly restrain the assessment, levy, or collection of taxes"); *Brooks v. Nance*, 801 F.2d 1237, 1239 (10th Cir. 1986) (holding TIA "cannot be avoided by an attack on the administration of a tax as opposed to the validity of the tax itself."). Indeed DMA acknowledges that "[t]axpayers (or their proxies) who challenge the process for obtaining information regarding their tax liability necessarily challenge the assessment of taxes against them." DMA Br., p. 49.

For good reason, therefore, DMA spends little time in its brief disputing that the Collection Act is directed at assessment and collection. Instead, the bulk of DMA's argument is that the Tenth Circuit misapplied the word "restrain" in light of that term's equitable history. *Id.*, pp. 21–36. That argument misses the mark. Once it is clear that the Collection Act is directed at assessment and collection of a valid tax, it necessarily follows that DMA's lawsuit would enjoin, suspend, and restrain Colorado's assessment and collection. The TIA requires nothing more. Because DMA seeks injunctive and declaratory relief that would restrain Colorado's chosen method of assessing and collecting its use tax — and because the outcome of DMA's suit would be to decrease state tax revenue — the Tenth Circuit correctly concluded that this suit "falls within the 'traditional heartland of TIA cases.'" Pet.App. A-19 (quoting *Hill v. Kemp*, 478 F.3d 1236, 1250 (10th Cir. 2007)).

C. Applying the Tax Injunction Act to DMA's suit furthers Congress's purpose of precluding federal interference with state tax assessment and collection.

This Court's precedents recognize the text, history, and purpose of the TIA require broadly applying it to actions seeking to enjoin state revenue-collection measures. The Court has long cautioned against the danger of interfering with the administration of state tax systems. "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the *modes adopted to enforce the taxes levied* should be interfered with as little as possible." *Dows v. City of Chicago*, 11 Wall. 108, 110 (1871) (emphasis added). *Accord Farm Credit*

Servs. of Cent. Ark., 520 U.S. at 826 ("The federal balance is well served when the several States define and elaborate their own laws through their own courts and administrative processes and without undue interference from the Federal Judiciary. The States' interest in the integrity of their own processes is of particular moment respecting questions of state taxation.").

Worried that lower federal courts had become "free and easy with injunctions" against the states, Congress found it necessary to enact the TIA's jurisdictional bar. *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 129 (1981) (internal quotations omitted). The TIA is "broad" and "prophylactic" and drastically limits federal court jurisdiction to interfere with the important local concern of the collection of taxes. *Rosewell*, 450 U.S. at 524. Congress sought to prevent disruption to state finances caused by the withholding of state tax revenue, and further sought to eliminate the disparity of large out-of-state corporations invoking federal diversity jurisdiction to challenge state tax laws when such relief was unavailable to local taxpaying citizens. *See Hibbs*, 542 U.S. at 104; DMA Br. App., pp. at 4-5, Congressional Record - Senate; Collection of State Taxes – Jurisdiction of Federal District Court (Feb. 19, 1937). The TIA "'has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations.'" *Rosewell*, 450 U.S. at 522 (quoting *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976)). It is a legislative codification of the "strong" presumption against "federal interference with state tax administration." *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 590 (1995).

This Court has consistently furthered these aims by instructing that "federal courts must guard against interpretations of the [TIA] which might defeat its purpose and text." *Farm Credit Servs. of Cent. Ark.*, 520 U.S. at 827. So long as a plain, speedy, and efficient remedy exists in state court,[2] the TIA bars any suit seeking to invoke the federal district court's equitable jurisdiction to interfere with the a state's tax assessment and collection system. It is well settled that the TIA divests the federal courts not only of jurisdiction to issue an injunction, "but also of jurisdiction to take actions that suspend or restrain the assessment and collection of state taxes." *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982). "[T]he declaratory judgment 'procedure may in every practical sense operate to suspend collection of the state taxes. . . .'" *Id.* (quoting *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943)).

Unsurprisingly, therefore, courts have applied the TIA's federal tax counterpart, the Anti-Injunction Act, to bar both direct challenges to federal taxes *and* suits that would interfere with activities that may culminate in the assessment or collection of taxes.[3] In *Bob Jones Univ. v. Simon*, this Court held the Anti-Injunction Act barred a university's suit challenging the IRS's revocation of a charitable organization's tax exempt status because such a suit would "interrupt the assessment and collection of taxes." 416 U.S. 725, 739 n.10 (1974). Although the university did not directly challenge any specific assessment or collection activity undertaken against either itself or any charitable donor, the Court determined the suit would prevent the IRS from assessing and collecting federal income, social security, and unemployment taxes. *Id.* at 738-39. *Accord Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401, 405 (4th Cir. 2003) ("[I]t is clear that the [AIA] extends beyond the mere assessment and collection of taxes to embrace other activities, such as an audit to determine tax liability, that may culminate in the assessment or collection of taxes."); *Koin v. Coyle*, 402 F.2d 468, 469 (7th Cir. 1968) (holding AIA barred suit seeking declaration that materials subject to criminal suppression order could not be used for civil tax assessment because while suit did not "directly and expressly aim at assessment," it was "directed expressly at the means to that end, and . . . is substantially aimed at restraining the assessment.").

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[2] The Tenth Circuit identified three plain, speedy and efficient state remedies available to challenge the Collection Act. Pet.App. A-26–A-32. DMA does not take issue with this portion of the court's opinion, although it criticizes Colorado's choice to not place a challenge mechanism within the law itself. DMA Br., p. 35 n.2. Any argument on this point should be deemed forfeited, but even if not, the argument fails. DMA has availed itself of one plain, speedy and already effective state remedy: litigating the same claims in Colorado state court. More to the point, it has obtained just the sort of preliminary injunctive relief it sought in this federal case.

DMA insists this case should be outside the TIA's reach because the lawsuit will not alter the amount of taxes consumers owe (and are legally obligated to remit) on each of their many relevant retail transactions.[4] This may be true in the most theoretical of senses, but is patently untrue as a matter of practical fact. The reality is that if a state cannot ensure customers receive accurate information about what they owe, it unsurprisingly encounters very little compliance with the requirement that they self-assess, report, and pay the tax. And if the state itself has no way of assessing who owes what, it has no way of collecting those taxes. The suit brought by DMA would enjoin a measure by which Colorado seeks to collect a large portion of hundreds of millions of dollars that today it cannot collect. That DMA's members' customers already owe that amount is irrelevant to whether Colorado can be enjoined from trying to collect it from them.

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[3] The Court has repeatedly recognized the common purposes and language of the two acts and interpreted them consistently. *E.g.*, *Hibbs*, 542 U.S. at 102 ("In composing the TIA's text, Congress drew particularly on . . . the Anti-Injunction Act").

D. The *Hibbs* exception does not extend to lawsuits challenging revenue-generating tax laws.

DMA's main argument, in the face of decades of contrary precedent from this Court and lower courts, is that the Court should expand the exception to the TIA it developed in *Hibbs* to apply to cases like this that would block revenue collection. DMA argues that the *Hibbs* decision means that the TIA cannot apply to any plaintiff who is a so-called "non-taxpayer" or "outsider" whose own tax liability is not at issue. DMA Br., pp. 15,

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[4] This is an odd focus since the TIA undoubtedly covers many actions that would not necessarily alter the amounts technically owing. An injunction blocking a lien, for example, or to prevent the garnishment of wages, would plainly enjoin or restrain the collection of a tax. *See, e.g., RTC Commercial Assets Trust 1995-NP3-1*, 169 F.3d at 453. Yet they would be exempt from the TIA under DMA's narrow interpretation.

18-21. But *Hibbs* was a response to a particular set of circumstances, and its application makes no sense in the present context.

Hibbs involved a challenge to a state tax credit that, if successful, would have resulted in an *increase* in the state's tax receipts — indeed, *Hibbs* involved the state's decision to *spend* money, not collect it. 542 U.S. at 108. The Court held that the TIA did not preclude the federal district court's jurisdiction because the plaintiffs did not seek to impede Arizona's receipt of tax revenues. *Id.* at 93.

Emphasizing the TIA's "state-revenue-protective moorings", *id.* at 106, the Court distinguished suits contesting state tax liability that would *reduce* state revenues if successful from challenges to the award of tax benefits that would have the effect of *enlarging* state receipts. *Id.* at 108. Ultimately, the Court held that an Establishment Clause challenge to Arizona's tax credit would have "no negative impact on tax collection" and thus did not implicate any of the TIA's underlying purposes. *Id.* at 94. This focus is repeated throughout the opinion. *See id.* at 108 (stating TIA does "not stop third parties from pursuing constitutional challenges to tax *benefits* in a federal forum." (emphasis added)); *id.* at 108-09 ("'*There was no articulated concern about federal courts' flogging state and local governments to collect additional taxes.*'" (quoting *Dunn v. Carey*, 808 F.2d 555, 558 (7th Cir. 1986)) [(emphasis in original)]; *Hibbs*, 542 U.S. at 109 (stating TIA "'has been held inapplicable to efforts to require collection of additional taxes, as opposed to efforts to inhibit the collection of taxes'" (quoting *In re Jackson County*, 834 F.2d 150, 151-52 (8th Cir. 1987))).

DMA would have the Court ignore this fundamental feature of *Hibbs* and instead focus on the identity of the plaintiff. There is no justification for doing so. Contrary to DMA's suggestion, *Hibbs* does not limit the TIA's jurisdictional bar to suits brought by taxpayers contesting their own liability. Neither the TIA's text, its purpose, nor this Court's precedent requires such a narrow reading of its scope and breadth. *See Levin*, 560 U.S. at 430 (referring to *Hibbs* as a "poor fit" under the TIA).

To the contrary, the Court has already recognized that the TIA applies regardless of the identity of the plaintiffs. *See Franchise Tax Bd. of Cal. v. Alcan Aluminum, Ltd.*, 493 U.S. 331, 339 (1990) (holding TIA applies to suit brought by taxpayer's shareholders, not taxpayer itself). Limiting the TIA to suits brought by taxpayers challenging their own liability, the *Alcan* Court recognized, would "elevate form over substance." *Id.* at 339. Similarly, in *Bob Jones*, the Anti-Injunction Act applied to the suit brought by the non-taxpayer university because the requested relief would alter the tax liability of the university's donors. 416 U.S. at 739. These cases recognize that the TIA is not concerned with the identity of the plaintiff, but rather the effect of the suit on the state's revenue collection efforts. A taxpayer is surely the most likely plaintiff in a case seeking to enjoin or restrain the assessment or collection of taxes, but there is no reason another entity or group might not seek to do so.

Consistent with the TIA's application to taxpayers and non-taxpayers alike, the Anti-Injunction Act has been routinely applied to non-taxpayers who play an important role in the tax system or the taxable event.

See, e.g., *Judicial Watch*, 317 F.3d at 405 ("[I]t is clear that the Anti-Injunction Act extends beyond the mere assessment and collection of taxes to embrace other activities, such as an audit to determine tax liability, that may culminate in the assessment or collection of taxes."); *Kemlon Products & Dev. v. United States*, 638 F.2d 1315, 1320 (5th Cir. 1981) ("We agree with the Seventh Circuit that 'this ban against judicial interference is applicable not only to the assessment or collection itself, but is equally applicable to activities which are intended to or may culminate in the assessment or collection of taxes.'" (quoting *United States v. Dema*, 544 F.2d 1373, 1376 (7th Cir. 1976))), *modified on other grounds*, 646 F.2d 223 (5th Cir. 1981); *Neilson v. United States*, 674 F. Supp. 2d 248, 254 (D.D.C. 2009) (applying AIA to bar action involving summons issued to third-party financial institutions with knowledge of taxpayer's tax liabilities). Indeed, the Court has explicitly held that the plain meaning of the Anti-Injunction Act's prohibition against suits for the purpose of restraining the collection of any tax should apply no matter who brings the suit. In *Bob Jones*, the Court noted that in response to an overly literal and technical reading of the Anti-Injunction Act — similar to that being urged by DMA here — Congress was forced to add clarifying language. 416 U.S. at 731 n.6; *see* 26 U.S.C. § 7421(a) (adding "by any person, whether or not such person is the person against whom such tax was assessed"). But, the Court explained, this language is simply "declaratory, not innovative"; it is "a reaffirmation of the plain meaning" of the original act, which was never meant to be limited to suits brought directly by taxpayers. *Bob Jones*, 416 U.S. at 731 n.6. The same is true of the TIA. *E.g.*, *Hibbs*, 542 U.S. at 102 ("In composing the TIA's text, Congress drew particularly on . . . the Anti-Injunction Act").

To expand *Hibbs* as DMA suggests would dramatically restrict the TIA. Under DMA's view, *any* law that is a vital part of the collection and assessment of state taxes may be challenged in federal district court so long as it does not directly impose a tax and the suit is brought by a third party. This would include employer reporting, bank reporting of non-wage income, and many other third-party reporting regimes central to tax assessment and collection. Both federal and state self-reporting tax systems routinely include requirements applicable to "non-taxpayer" persons possessing information related to tax liability. For example, the Internal Revenue Code ("IRC") imposes numerous record-keeping requirements on persons other than the taxpayer immediately liable. *See, e.g.*, 26 U.S.C. § 7603(b) (identifying various "third-party recordkeepers," including banks, consumer reporting agencies, attorneys, and accountants); *cf.* COLO. REV. STAT. § 39-21-113(1)(b) (imposing records retention requirements on persons liable for filing report in connection with any tax imposed). The IRC also imposes a wide variety of information-reporting requirements. *See, e.g.*, 26 U.S.C. § 6041, *et seq*. (Part III, Subpart B - Information Concerning Transactions With Other Persons) (including information on payments of dividends, corporate earnings, and profits; organization or reorganization of foreign corporations; social security benefits; higher education tuition and related expenses; and credit for health insurance costs). These third-party reporting requirements on "non-taxpayers" are every bit as critical to the tax assessment and collection system as a taxpayer's self-assessment. Challenges to such requirements therefore trigger the same jurisdictional bars as challenges to the taxes themselves. No meaningful distinction exists between suits brought by taxpayers and those brought by other persons subject to laws central to a state's tax assessment and collection laws.[5]

This is not a case that depends on arguing that the TIA covers "all aspects of tax administration.'" *Cf.* DMA Br., p. 21 (quoting ***Hibbs***, 542 U.S. at 105). At most, this is about the administration of the tax assessment and collection system — not some ancillary aspect of state tax administration. By contrast, activities like the gathering and publication of statistics and reports, although part of tax administration, are not covered by the TIA. *See, e.g.*, 26 U.S.C. § 6103(b)(4) (defining "tax administration" to include not only "assessment, collection, enforcement, [and] litigation" under tax laws, but also activities such as development and formulation of tax policy related to existing and proposed laws and gathering of statistical information); *cf.* COLO. REV. STAT. §§ 24-35-108 (establishing authority of Department to collect taxes); 24-35-108.5

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[5] DMA's and its amici's citation to cases involving challenges to revenue-neutral laws or policies, *i.e.*, laws that neither act to increase or decrease *tax* revenues, are therefore inapposite. *See, e.g.*, ***BellSouth Telecomms., Inc. v. Farris***, 542 F.3d 499, 502-03 (6th Cir. 2008) (challenged law prohibited telephone company from informing customers about tax imposed on company); ***Mobil Oil Corp. v. Dubno***, 639 F.2d 919, 922 (2d Cir. 1981) (challenged law contained anti-pass-through provision); ***Fredrickson v. Starbucks Corp.***, 980 F. Supp. 2d 1227, 1232-33 (D.C. Ore. 2013) (challenged employer policy did not affect taxpayer's obligation to pay taxes on tips).

(requiring the Department to publish annual reports on taxes paid).

The Tenth Circuit, following the Fifth Circuit, thus recognized the straightforward and limited reach of the *Hibbs* exception. The court of appeals properly interpreted *Hibbs* to render the TIA inapplicable only to challenges that (1) are brought by a non-taxpayer, and (2) would not deplete state revenues. *See* Pet.App. A-15 n.6 (quoting *Henderson v. Stalder*, 407 F.3d 351, 359 (5th Cir. 2005)). This sensible line recognizes the fundamental distinction between the true third-party, outsider attack on state tax expenditures at issue in *Hibbs* and the revenue-generating measures here that are central to Colorado's tax collection effort.[6]

Even if the TIA were to be limited to suits brought by "insiders," it would apply here. This Court in *Levin* refined its *Hibbs* exception, explaining that the plaintiffs in *Hibbs* were "outsiders" to the tax system who did not object to their own treatment under the tax code and whose own liability was not relevant. *Levin*, 560 U.S. at 430. In contrast, the *Levin* plaintiffs objected to their own tax situation, "measured by the allegedly more favorable treatment accorded [their competitors]." *Id.*

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[6] To the extent *Hibbs* may be read to drastically limit the TIA to federal suits by taxpayers seeking to contest their own liability, it should be revisited. *See Levin*, 560 U.S. at 433 (Kennedy, J., concurring) (stating *Hibbs* remains "doubtful" but acknowledging nothing in *Levin* majority expands *Hibbs*); *id.* at 437 (Alito, J., concurring) (stating continuing viability of *Hibbs'* foundation "is a question that can be left for another day."); *id.* at 433 (Thomas, J., concurring) (remaining "skeptical" of *Hibbs'* holding but stating "it is not necessary for us to revisit that decision to hold that this case belongs in state court."). At the very least, this Court should clarify that *Hibbs* applies only to tax credits or expenditures, not to revenue-generating laws.

Similarly, DMA's members cannot be described as "'outsiders' to the revenue-raising state-tax regime they ask the federal courts to restrain." *See id.*, 560 U.S. at 435 (Thomas, J., concurring in the judgment). As the Complaint shows, DMA objects to its members' "tax situation" as measured by the allegedly more favorable treatment accorded to in-state Colorado retailers who are not granted the choice offered by the Collection Act. *See, e.g.*, C.A. App. 17 ("The Act does not impose these notice and reporting obligations upon Colorado retailers."); C.A. App. 26 (stating the Collection Act imposes "upon out-of-state retailers who do not collect Colorado sales tax . . . notice and reporting obligations . . . that the Act does not impose on Colorado retailers.").

In the compensatory sales and use tax scheme, *all* retailers who make sales in Colorado, whether collecting or non-collecting, are "insiders" to the sales and use tax system. They are parties to the very transaction being taxed. If not for *Quill* they would be liable directly for the tax itself. They possess direct, firsthand, critical source information about the taxable sales. This is in direct contrast to the common carriers in *United Parcel Service, Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003) ("*UPS I*"), where common carriers were required to either withhold package delivery if excise tax had not been paid or pre-pay the excise tax on behalf of the recipient. The court held that Puerto Rico's TIA analog, the Butler Act, was inapplicable. Unlike DMA's members, these common carriers were in no measure insiders – they were not an original party to the transaction being taxed, nor did they have any firsthand access to the source tax information about the package. *See id.* at 327 & n.4 (requiring UPS to collect information from shipper – a party to taxable transaction – in order to determine tax owed).

The Collection Act offers DMA's members the choice to comply with its reporting requirements in lieu of collecting and remitting sales and use tax, a choice unavailable to in-state retailers. This fact does not render DMA's members third-party outsiders in any reasonable sense. The advantage they have over physically present retailers should not be multiplied by giving them a litigation advantage as well. *See Hibbs*, 542 U.S. at 104 (noting one purpose of TIA was to prevent undue advantage to out-of-state litigants).

E. Applying the Tax Injunction Act here does not unduly expand its scope but rather furthers Congress's purpose of protecting the primacy of state court review.

In its effort to shrink the TIA's scope and expand *Hibbs*, DMA and its amici raise an array of policy concerns and allegedly dangerous hypothetical extensions of the TIA's coverage. To the extent these are legitimate policy concerns (and they are not), the courts are not the forum to raise them. Congress deliberately chose to word the TIA broadly, and if DMA and its amici desire a narrowing construction, Congress can provide that remedy.

1. Applying the TIA here will not create an unwarranted expansion of the jurisdictional bar.

DMA argues affirming the Tenth Circuit's decision here will lead to a parade of horribles. But there is much room between DMA's suggested extremes of limiting the TIA to suits brought by taxpayers contesting their own tax liability, no matter the impact on the State, and sweeping applications of the TIA to bar all challenges to state laws with speculative or distant impacts on tax collection.

DMA cites, for instance, *Florida Bankers v. U.S. Department of Treasury*, involving a regulation requiring financial institutions within the United States to report the interest earned by non-resident alien accountholders to the IRS. *See* 2014 U.S. Dist. LEXIS 3521 (D.D.C. Jan. 13, 2014); DMA Br., pp. 45-48. Although the alien account holders did not owe U.S. taxes, the IRS sought to use the reported information to exchange similar information with foreign governments about U.S. account holders overseas. 2014 U.S. Dist. LEXIS 3521 (D.D.C. Jan. 13, 2014). The district court declined to apply the Anti-Injunction Act to bar a suit brought by certain financial institutions. Whether that was the correct decision is debatable. But even if it was, there is no reason affirming the court of appeals' decision here would necessitate a different outcome there. The financial institutions in *Florida Bankers* did not have any relationship to a taxable transaction or access to, much less firsthand knowledge of, tax information related to domestic tax collection. Unlike DMA's members here, the financial institutions were not parties to taxable domestic transactions and, thus, were more akin to "outsiders."

The same is true for DMA's hypothetical common carriers charged with searching for cocaine. DMA Br., pp. 52-54. Much like the common carriers in *UPS I,* or the parties seeking to reallocate state resources in *Hibbs*, the common carrier is an "outsider[ ] to the tax expenditure," *Levin*, 560 U.S. at 430, possessing no direct, firsthand knowledge of the contents of the package or the tax owed on its contents. A common carrier in this hypothetical is not a party to any relevant taxable transaction.

The concern about states loading up their tax codes with veiled regulatory measures is equally misplaced. *See, e.g.*, Br. of Amicus Inst. for Prof'ls in Taxation, pp. 16-21. Some of the identified "guises" are no doubt integral to our tax system, such as interest-income reports from banks, and would be subject to the TIA just as surely as a challenge to the wage-withholding reporting regime would be. *See Blangeres*, 872 F.2d at 328; *Sipe v. Amerada Hess Corp.*, 689 F.2d 396, 403 (3d Cir. 1982). But others having no relation to tax production — like a gun or fishing permit — can readily be filtered out through the well-developed jurisprudence distinguishing taxes from regulatory measures and fees. *See* 3A SUTHERLAND STATUTORY CONSTRUCTION § 66:10 (7th ed.) (collecting cases). *Accord Hill*, 478 F.3d at 1244 (citing 1 Thomas M. Cooley, THE LAW OF TAXATION 98 (4th ed. 1924)); *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1011 (5th Cir. 1998); *see also Nat'l Fed. Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2582-84 (2012) (distinguishing taxes from penalties). Although a law may sometimes possess a mix of regulatory and tax-generating purposes, none of the examples cited by DMA's amici bears any resemblance to the pure tax assessment and collection system being challenged here. And again, DMA argues as if application of the TIA renders litigants wholly unable to bring their claims at all, when in fact all it means is they must begin in state court.

Wells v. Malloy, 510 F.2d 74 (2d Cir. 1975), is of limited use to DMA for different reasons. DMA argues it shows the TIA should be inapplicable to "coercive" revenue raising measures and that the Collection Act is one such coercive measure. *See id.* (requiring suspension of driver's license if tax not paid on vehicle). In *Wells*, the court stated that the TIA did not cover tax regulations that operate to produce tax money "through a more general use of the coercive power." *Id.* at 77. In other words, the court held that regulations that impose a sanction on taxpayers who refuse to pay a tax due fall outside the TIA. *See* Pet.App. A-23; *Wells*, 510 F.2d at 76.

This bears little relation to the Collection Act. Rather than revoking an important license for failure to pay a tax, the law being challenged here gives DMA's members the option of either collecting the tax at "checkout" or complying with the information reporting requirements.

The analogy would be more apt had Colorado prohibited retailers from making sales in Colorado if they failed to collect and remit sales taxes, but it did not. Such was the case in *UPS I*, the tax regulation threatened the common carrier with loss of its business license if it delivered a package without ensuring the excise tax was paid.[7] *See UPS I*, 318 F.3d at 331. Moreover, the common carrier in *UPS I* was in no way a party to the taxable transaction. *See id*. Here, as explained, every DMA member with standing to challenge Colorado's laws is an "insider" to the transaction that results in the tax being owed.

In any case, it is questionable whether *this* coercion distinction drawn by DMA should have any bearing on the TIA's application. The tax system necessarily relies on legal compulsion to be effective. *See Bisceglia*, 420 U.S. at 145 (noting tax system contains elements of both "legal compulsion" and "self-reporting"). *See also Sebelius*, 132 S. Ct. at 2596 (Roberts, C.J.) (stating "[e]very tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed." (alteration in original) (internal quotation marks omitted)). Limiting the TIA's reach to "pure" tax measures that do not contain a measure of legal compulsion would leave nothing of it.

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[7] Later First Circuit cases interpreting the Butler Act, including follow-up litigation to *UPS I*, no longer rely on a "coercion" analysis when determining whether the district courts possess jurisdiction. *See Pleasures of San Patricio, Inc. v. Mendez-Torres*, 596 F.3d 1, 6-7 (1st Cir. 2010); *Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3, 13-14 (1st Cir. 2009); *United Parcel Serv., Inc. v. Flores-Galarza*, 385 F.3d 9, 14-15 (1st Cir. 2004) ("*UPS II*"). Following *Hibbs*, each of these circuit court cases invokes a "revenue-raising" analysis when applying the Butler Act. None even mentions the word "coercion," implicitly recognizing the inevitable line-drawing problems such an analysis entails.

2. State courts can be trusted to enforce the Constitution.

DMA suggests an additional factor counsels against applying the TIA under the circumstances presented here: this Court should give effect to the perception apparently held by out-of-state litigants that a state court cannot, or will not, fairly and impartially apply federal law. DMA Br., pp. 54-57. The suggestion that state courts are incapable of neutrally applying federal law has been rightly and routinely rejected by this Court. In rebuffing such an argument in the face of a challenge to the TIA, this Court stated:

> [We] are unwilling to assume that there now exists a general lack of appropriate sensitivity to the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.

Grace Brethren Church, 457 U.S. at 417 n.37 (quoting *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976)); *see also Alexander v. Americans United, Inc.*, 416 U.S. 752, 759 (1974) (stating "decisions of this Court make it unmistakably clear that the constitutional nature of a taxpayer's claim" does not preclude application of Anti-Injunction Act).

Basic federalism principles dictate that state courts have the obligation to uphold federal law and are capable of doing so. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 275 (1997) ("A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism."). DMA's concern appears to originate solely from its members' perception regarding the impartiality of state courts, and is not based on any factual showing that state courts cannot fairly apply federal law. Acceding to a perception in the community that state courts are inadequate is no less invidious to basic principles of federalism than actually crafting a doctrine based on the inadequacy of state courts. *See id.* at 276 ("It would be error coupled with irony were we to bypass the Eleventh Amendment, which enacts a scheme solicitous of the States, on the sole rationale that state courts are inadequate to enforce and interpret federal rights in every case.").

In any event, DMA's argument again flounders for an additional reason. The TIA expressly allows for relief in federal court where there is no "plain, speedy, and efficient remedy" available. 28 U.S.C. § 1341; *see Hibbs*, 542 U.S. at 113 (Kennedy, J., dissenting) ("Dismissive treatment of state courts is particularly unjustified since the TIA, by express terms, provides a federal safeguard: The [TIA] lifts its bar on federal-court intervention when state courts fail to provide a 'plain, speedy, and efficient remedy.'"). That is, if DMA's members are correct that a particular state's courts are inadequate, the TIA grants them their day in federal court. But the current posture of this case belies any such claim: DMA has already brought a state court suit and won a preliminary injunction. DMA is in no position to complain of an inadequate Colorado state court remedy.

The adequacy of the state court remedy is further guaranteed by the availability of final appellate review in this Court. Members of this Court have made clear they "stand[ ] at the ready" to review decisions of state courts on these types of tax matters. *Hibbs*, 542 U.S. at 121 (Kennedy, J., dissenting).

Finally, one of the TIA's two "closely related, state-revenue-protective objectives" was "to eliminate disparities between taxpayers who could seek injunctive relief in federal court — usually out-of-state corporations asserting diversity jurisdiction — and taxpayers with recourse only to state courts, which generally required taxpayers to pay first and litigate later." *Id.* at 104. If the instant case is outside the reach of the TIA, then remote retailers will have yet one more advantage over those with a physical presence in a given state. They will be able to seek injunctive relief in the federal courts while the local retailer, or the out-of-state corporation with a physical presence in the state, will have recourse only to the state courts. This result would be yet another violation of the TIA's purpose.

Two considerations counsel nonetheless in favor of reading the TIA to cover revenue-protective measures. First, unlike the Anti-Injunction Act, the TIA is not a complete bar to an injunction — as the intervening history of this very case shows, it merely moves such claims into a state forum. And finally, to the extent any of these horribles were to come true, Congress remains free to — and does — exempt specified categories of state taxation from the TIA when it desires. *See, e.g., Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 457-58 (1987) (discussing exception to TIA created by Railroad Revitalization and Regulatory Reform Act, allowing railroads to challenge discriminatory state taxes in federal court). The Court should reject the invitation to do for DMA what Congress has not elected to do.

II. Although the TIA provides the smoothest path to dismissal, this Court may also affirm based on comity principles.

The Tenth Circuit ruled that, in addition to the TIA, principles of comity compelled dismissal of DMA's federal suit. Pet.App. A-33 n.11. Because the TIA's mandatory jurisdictional bar should apply, this Court need not specifically invoke notions of comity. Nevertheless, comity principles provide an independent basis, or at least additional support, for affirmance.

To begin, the court of appeals' decision to address comity even where the issue was not briefed below does not constitute error. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408 (1964) (addressing respondents' comity argument "[e]ven though the respondents did not raise this point in the lower courts"), *superseded by statute on other grounds*, 22 U.S.C. § 2370(e)(2); E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice 490 (9th ed. 2007) ("[A] party satisfied with the action of a lower court should not have to appeal from it in order to defend a judgment in his or her favor on any ground"); *see also District Lock & Hardware, Inc. v. District of Columbia*, 808 F. Supp. 36, 43 (D.D.C. 2011) (collecting cases holding principle of comity cannot be waived in state tax matters "even if the state is willing.").

Moreover, the TIA is best understood as a "partial codification" of comity, expressing federal reluctance to interfere in state affairs. *Nat'l Private Truck Council,* *Inc.*, 515 U.S. at 590. Because comity principles are embraced within the TIA's legislative history and text, two issues advanced by DMA, the Department is permitted to seek affirmance of the Tenth Circuit's decision in full. *See Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980) (adjudicating issue "fairly comprised" in question set forth and stating, "[i]n any event, consideration of issues . . . not presented in the Court of Appeals is not beyond our power, and, in appropriate circumstances, we have addressed them.").

In *Levin*, this Court synthesized a "confluence" of three factors to be analyzed when determining whether comity principles compel forbearance to state adjudications: (1) the State's freedom to make tax classifications (as opposed to the State's inability to make suspect classifications based on protected personal attributes of regulated persons), (2) whether a goal of the suit is to improve a plaintiff's competitive position in the market place, and (3) the State court's relative flexibility to correct any violation. 560 U.S. at 431. The Tenth Circuit's decision under these factors to defer to the State's adjudicative process is manifestly correct and should not be disturbed. Pet.App. A-33 n.11.

Under the first factor, no suspect classification or fundamental right is implicated here. Like the *Levin* plaintiffs, DMA asserts violations of the Commerce Clause. 560 U.S. at 430-31. Those assertions are insufficient to overcome the "demand[ed] deference" owed to the state courts. *Id.* at 432.

The second factor is equally unavailing. Through its requested relief — permanent enjoinment of the Collection Act — DMA seeks to maintain its members' perceived price advantage at the checkout counter over their in-state competitors who must charge and collect Colorado's sales and use tax. Now, DMA members seek to parlay this *Quill*-created competitive advantage into a further benefit: direct access to the federal district courts. DMA's competitors have no such access. This is contrary to the impetus of the TIA. *See, e.g.*, *Hibbs*, 542 U.S. at 104. Accordingly, DMA is requesting "federal-court aid" in an endeavor to improve its members' competitive position. *See Levin*, 560 U.S. at 431. Comity compels the Court to decline the request.

The third and final *Levin* factor — the state court's relative flexibility in correcting any violation — also supports the Tenth Circuit's decision. Wholesale invalidation of Colorado's Collection Act is not the *only* possible remedy in the event a constitutional infirmity is proven. Colorado's state courts, unconstrained in their remedial options by the TIA, may sever any discrete portion of the Collection Act that is constitutionally infirm. *E.g., Bd. of County Comm'rs v. Vail Assocs., Inc.*, 19 P.3d 1263, 1280 (Colo. 2001). It remains to be seen whether DMA will carry its burden of demonstrating unconstitutionality as to the entire statutory scheme, a single discrete subpart, or none at all. In any event, being "more familiar with state legislative preferences," *Levin*, 560 U.S. at 432, Colorado's state courts may attempt "to implement what the legislature would have willed had it been apprised of the constitutional infirmity." *Id.* at 427.

Other "'special reasons'" rooted in comity also justify the Tenth Circuit's decision to adhere to the policy of federal noninterference. *Id.* at 422 n.2 (quoting *Perez v. Ledesma*, 401 U.S. 82, 127 n.17 (1971) (Brennan, J., concurring in part and dissenting in part)). Justice Brennan more than 40 years ago cautioned that concern over "damage to the State's budget" and state "insolvency" counsel in favor of state courts exercising jurisdiction in the first instance. *Perez*, 401 U.S. at 127 n.17 (Brennan, J., concurring in part and dissenting in part). He explained that federal constitutional issues will likely turn on questions of state tax and regulatory law, which "are more properly heard in state courts." *Id.* Justice Brennan's concerns apply with particular force here. DMA is not challenging an incidental licensing fee or service charge. DMA attacks the core method Colorado has chosen to collect the use tax on remote sales. This suit should be heard — and currently is being heard — in Colorado state court.

Accordingly, although the TIA provides the "proper" avenue of dismissal, *Levin,* 560 U.S. at 434 (Thomas, J., concurring), principles of comity offer independent and supporting grounds for upholding the lower court.

CONCLUSION

The court of appeals should be affirmed.

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Dated: OCTOBER 17, 2014

REPLY
BRIEF

No. 13-1032

In The
Supreme Court of the United States

◆

DIRECT MARKETING ASSOCIATION,

Petitioner,

v.

BARBARA BROHL,
IN HER CAPACITY AS EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF REVENUE,

Respondent.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit**

◆

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ARGUMENT

I. RESPONDENT PROVIDES NO SUPPORT FROM THE TEXT OF THE TAX INJUNCTION ACT FOR THE TENTH CIRCUIT'S RULING.

A. The Respondent's Focus On The Colorado Act's Purported "Importance" Is Misplaced.

Rather than addressing the proper interpretation of the text of the Tax Injunction Act, 28 U.S.C. § 1341 ("TIA"), the Respondent devotes her attention to arguing the merits of limitations on state taxing power under *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), an issue not before the Court and which this Court has made clear Congress is best able to resolve. *Id.* at 318.

At the same time, the Respondent and her supporting amici insist, in exaggerated terms, upon the "integral" nature of the consumer notice and information reporting requirements of Colo. Rev. Stat. §§ 39-21-112(3.5)(c) & (d) ("Colorado Act"), as though this unprecedented law was a fixture of every state tax system. The Respondent grossly inflates the importance of the Colorado Act's requirements to the Colorado sales and use tax regime.

Most tellingly, the Respondent has never, prior to her appearance before this Court, argued that the Colorado Act is an important component of the State's tax system. To the contrary, in her briefs to the Court of Appeals, the Respondent acknowledged the non-tax nature of the Colorado Act's notice and reporting requirements:

> *By treating the information reporting requirements of Colorado's Law like a tax*, the district court may have *unnecessarily implicated the Tax Injunction Act* ("TIA"). 28 U.S.C. § 1341 (providing federal courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State"). In any event, this Court may reverse the district court's injunction *without running afoul of the TIA or comity principles*.

Appellant's Brief at 31 n.3 (italics added). The Respondent never sought dismissal in the lower courts based on the TIA precisely because the notice and reporting requirements of the Colorado Act are *not* integral to Colorado's use tax system, or even "tax" requirements, at all. The Respondent's newly-adopted position regarding the centrality of the Act's requirements to Colorado's tax system rings hollow.

The Colorado Act should be placed in proper perspective. Enacted in 2010, it is the only state law of its kind. No other state requires out-of-state (or in-state) retailers to file reports of their customers' purchasing activity with the state tax agency. The South Carolina statute cited by the Respondent (Resp. Br. at 7), which she suggests imposes a consumer notification requirement "similar" to the Annual Purchase Summary, was adopted after the

Colorado Act and targets a "class of one" (*i.e.*, Amazon.com) for a limited period of time.[1] While four states have adopted consumer notice provisions akin to the Transactional Notice, each with its own particular features, *see* Okla. Stat. Ann., tit. 68, § 1406.1(A) (2010); S.D. Codified Laws § 10-63-2 (2011); Vt. Stat. Ann., tit. 32, § 9783 (2011); Ky. Rev. Stat. Ann. § 139.450(2)(a) (2013), none of these other states' laws contains a requirement that retailers send annual notices to consumers or report their customers' purchasing histories to the department of revenue. The Colorado Act stands alone.

Nor does the Colorado Act have the dramatic budget implications now accorded to it by the Respondent. Even the rosy projections contained in the fiscal note for the Colorado Act, revised after DMA filed suit, estimated initial annual revenue of only $12.5 million. J.A. 114.[2] This was less than two-tenths

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[1] The South Carolina statute applies to a person who, between December 31, 2010 and January 1, 2013: (1) placed a distribution center in the state; (2) made a capital investment of at least $125 million in the state; and (3) created at least 2,000 full-time jobs in the state. S.C. Code Ann. § 12-36-2691(C) (2011). The statute expires on January 1, 2016. *Id.* § 12-36-2691(D).

[2] The revenue projections in the fiscal note, which are also relied upon by the Respondent and her supporting amici, are based on a 2009 study by William Fox. The estimates put forward by Professor Fox have been challenged as grossly inaccurate by a study authored by economists Jeffrey Eisenach and Robert Littan. *See* C.A. App. 850-909 (J.A. 6 (Dckt. 56-8)). The Fox study has not been updated to take account of developments since its issuance in 2009, including the continued growth

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of one percent (0.18%) of Colorado's total projected tax revenues. *See* J.A. 112 (revenue of $6.8 billion projected for fiscal year 2011).

In fact, the revenue to be realized from the Colorado Act had little to do with the law's enforcement. Instead, as admitted by the Department's Tax Policy Director, the anticipated consequence of the new legislation would be to force remote sellers to surrender their constitutional protections under *Quill* and collect state use taxes, rather than hand over sensitive customer information. *See* C.A. App. at 132, 146.

The fact that the Department's primary objective was to coerce out-of-state retailers to collect state taxes is further demonstrated by the failure of Colorado to adopt simple measures to increase taxpayer compliance adopted by many states. Most notably, unlike more than 25 other states, Colorado did not include a line on its individual income tax returns for the reporting of use tax on out-of-state purchases. In addition, Colorado is the only state not participating in the sales tax simplification efforts of the Streamlined Sales and Use Tax Agreement ("SSUTA"), *see* http://www.streamlinedsalestax.org/uploads/images/state%20map%202014_1_1.jpg, a multi-state compact whose limited sales/use tax-simplification measures

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of the SSUTA and the dramatic increase in tax collection by Internet behemoth Amazon.com, which now collects sales tax in 23 states.

became the basis for federal legislation passed in the United States Senate in May 2013. S. 743, 113th Congress (2013), https://www.congress.gov/bill/113th-congress/senate-bill/743. Nor has Colorado sought to increase use tax reporting through its electronic filing system for individual income tax, which over 80% of Colorado taxpayers use each year, nor has it adopted a default use tax calculation to simplify tax reporting by consumers.

B. The Respondent Neither Defends The Tenth Circuit's Interpretation Of The TIA's Text, Nor Provides A Well-Reasoned Alternative Interpretation.

More to the point, although the central issue on appeal is the proper interpretation of the TIA's text, the Respondent gives the task of statutory interpretation only cursory attention. Like the Tenth Circuit, the Respondent fails to recognize that the operative words in the TIA are terms of art, and must be construed in context and with reference to the Act's underlying purpose and history of enforcement. The Respondent complains that the DMA's careful reading of the TIA's text is "overly literal and technical" (Resp. Br. at 28), but demonstrates no weaknesses in the DMA's interpretive analysis.

With regard to the TIA's first operative clause ("enjoin, suspend or restrain"), which was the basis for the Tenth Circuit's opinion below, Pet.App. at A-16, the Respondent disavows the need for any interpretation at all. In sharp contrast to the DMA's examination of the statutory text, the Respondent devotes a single sentence to describing the Tenth Circuit's reasoning, and then argues that because the DMA sought injunctive relief, the precise meanings of "enjoin," "suspend" and "restrain" are immaterial. Resp. Br. at 17-18. The Respondent's conclusion that no analysis of the TIA's terms is required misses the point.

It is self-evident that the DMA sought an injunction. Its claims are a straightforward challenge to the constitutionality of the notice and reporting requirements of the Colorado Act. On their face, however, the Transactional Notice, Annual Purchase Summary, and Customer Information Report are *not*, in the words of the TIA's second operative clause, the "assessment, levy or collection" of a tax. Presented with a state law whose requirements are not the types of taxing functions that Congress determined should only be challenged through available state procedures, the Tenth Circuit resorted to an expansive reading of the term "restrain." As the DMA demonstrated, the Tenth Circuit's reliance on modern dictionaries to define "restrain" ignores the aim of the TIA as a limitation on the grant of equity power to the district courts, fails to take account of the TIA's similarities, and its differences, with prior statutes of similar import, and fails to give independent meaning to each of the terms chosen by Congress. The Respondent presents no defense for the cornerstone of the Tenth Circuit's reasoning.

With regard to the TIA's second operative clause ("assessment, levy or collection") – terms the Tenth Circuit failed to define – the Respondent likewise provides no clear interpretive rationale for the statutory text. *See* Resp. Br. at 18-19. Apparently arguing that the word "assessment" in the TIA encompasses actions by parties other than the taxing authority (such as a taxpayer's "self-assessment" of income tax), the Respondent misconstrues this Court's discussion of the term "assessment" in *Hibbs v. Winn*, 542 U.S. 88, 100-02 and n.3 (2004). There, the Court commented that for income taxes, although a taxpayer may "self-assess" the tax in the first instance, the technical term "assessment" refers to the action *by the taxing authority*, not any action by the taxpayer. *Id.* at 100 n.3; *see also* 542 U.S. at 115 (Kennedy, J., dissenting) ("The recording of the liability on the Government's tax roll is itself an assessment" without regard to who performed the underlying calculation). As the Court recognized, the "assessment" of a tax has distinct legal significance. The assessment of a tax by revenue officials triggers the taxpayer's obligation to either pay the tax and/or contest it, starts the running of prescribed appeal periods and statutes of limitations, and is the basis for subsequent actions to collect the tax. *Id.* at 101-02; *see, e.g., United States v. Galletti*, 541 U.S. 114, 122-23 (2004) (assessment of tax against partnership extended statute of limitations against general partners).

Indeed, the Respondent's citation to Colorado tax law illustrates the point. The Respondent suggests that sales taxes are "assessed" by retailers at the point of sale (Resp. Br. at 19), but her proposition is contradicted by Colorado's tax code. The sales tax provision the Respondent cites, Colo. Rev. Stat. § 39-26-105, does not contain the term "assessment" or any variation thereof. Rather, Colorado's tax code makes clear – consistent with the meaning of the term as used in the TIA – that the "assessment" of the tax is the recording of a taxpayer's liability by the Department. *See* Colo. Rev. Stat. § 39-21-107(a) ("the amount of any tax imposed pursuant to article [26, Sales & Use Taxes] shall be assessed within three years after the return was filed and no assessment shall be made after the expiration of such period") (ellipses and brackets added); *see also* Colo. Rev. Stat. § 39-26-204(3) (indicating procedure for assessing use tax against retailers); Colo. Rev. Stat. § 39-26-210 (use tax not to be assessed more than three years after tax was payable). A taxpayer's actions prior to the recording of the liability by revenue officials are simply not the "assessment" of the tax.

The Respondent's approach to interpretation of the word "collection" is likewise abbreviated and misguided. The Respondent chooses between two partial definitions of a related word ("collect") contained in a recently-published dictionary (Webster's International Dictionary (3d ed. 2002)),[3] without reference to any tax code, tax treatise, or case law, and offering no examples of the kinds of "collection" activities encompassed by the TIA. Resp. Br. at 19. The meaning thus ascribed to the term by the Respondent of any "effort to receive or extract tax payments" *(id.)* is both imprecise and overly-expansive, and would require overturning cases in which the Respondent accepts federal courts as having properly exercised jurisdiction, such as *United Parcel Service, Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003) and *Wells v. Malloy*, 510 F.2d 74 (2d Cir. 1975). *See* Resp. Br. at 32-33, 36-37.

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[3] The Tenth Circuit made a similar error with respect to its interpretation of "restrain." Pet'r Br. at 22-23 (*citing Hibbs*, 542 U.S. at 116 (Kennedy, J., dissenting)).

In the end, the Respondent's reading of the TIA provides no support for the Tenth Circuit's ruling below. The bulk of her argument is disconnected from the statutory text, and instead depends upon her contention that the TIA should apply based on the "importance" of the notice and reporting requirements to Colorado's tax system as its "chosen method" for pursuing payment of use tax by consumers. However, under the TIA, not every regulatory requirement that touches upon state taxes is shielded from review in federal court.

II. THE DMA'S CLAIMS FALL OUTSIDE OF THE TIA'S JURISDICTIONAL BAR.

As demonstrated by the DMA, the words "assessment, levy or collection" in the TIA are terms of art that signify specific actions undertaken by state revenue departments to record tax liability and pursue its enforcement. Pet'r Br. at 36-39. When these words are read together with the TIA's limitation on federal equity jurisdiction, the TIA, on its face, precludes any equitable remedy that prevents a state from registering the amount of tax due the state or proceeding to recover such sums from a taxpayer.

As this Court has consistently explained since its first exposition of the TIA in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), the principle of non-interference with state affairs by federal courts sitting in equity was made most manifest in the area of state taxes. Federal courts have historically refused to grant injunctive relief to taxpayers preventing the collection of state taxes, when the state itself provided an adequate remedy. *Id.* at 297-301. The core purpose of the TIA has always been to bar federal court jurisdiction over challenges to state tax liability brought by taxpayers seeking to circumvent established state administrative procedures (typically, a process requiring payment and filing a claim for refund). Pet'r Br. 18-21.

A. Suits By Taxpayers Challenging Their Liability Lie At The Secure Core Of The TIA.

Most suits challenging state tax laws that implicate the TIA present a familiar pattern: a taxpayer (or its proxy) files a suit disputing the amount or validity of state taxes imposed (or to be imposed) upon it, seeking a federal forum that will enable the taxpayer to bypass the prescribed procedures for contesting taxes under state law. In that great majority of tax-related cases, the TIA's broad jurisdictional barrier forecloses federal court jurisdiction, regardless of the manner in which the plaintiff seeks to frame its suit.

Indeed, in each purportedly instructive lower court decision cited by the Respondent concerning the TIA or the Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421(a), the plaintiff was the taxpayer (or a successor to the taxpayer), and not a third party. *See* Resp. Br. at 20, 24, 28 (citing cases in which TIA or AIA precluded jurisdiction, *e.g.*, *Blangeres v. Burlington N., Inc.*, 872 F.2d 327 (9th Cir. 1989) (TIA) (taxpayer employees sought to enjoin reporting of wage information by employer); *Gass v. County of Allegheny*, 371 F.3d 134, 135-36 (3d Cir.) (TIA) (taxpayers challenged appellate board's practice of using *ex parte* evidence to assess property value), *cert. denied*, 543 U.S. 987 (2004); *Amos v. Glynn County Bd. of Tax Assessors*, 347 F.3d 1249, 1253 (11th Cir. 2003) (TIA) (taxpayers contested assessment method alleged to result in disproportionate tax burden); *RTC Commercial Assets Trust 1995-NP3-1 v. Phoenix Bond & Indem. Co.*, 169 F.3d 448, 453-54 (7th Cir. 1999) (TIA) (successor to mortgagee challenged validity of tax lien on mortgaged property); *Brooks v. Nance*, 801 F.2d 1237, 1239 (10th Cir. 1986) (TIA) (taxpayers contested seizure of cigarettes on which plaintiffs had not paid tax); *Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401, 408 (4th Cir.) (AIA) (nonprofit organization sought to prevent audit of its qualification for tax exempt status), *cert. denied*, 540 U.S. 825 (2003); *Koin v. Coyle*, 402 F.2d 468, 469 (7th Cir. 1968) (AIA) (taxpayer sought to prevent use of evidence gathered in criminal investigation as basis for tax assessment); *Kemlon Products & Dev. Co. v. United States*, 638 F.2d 1315, 1318 (5th Cir.) (AIA) (taxpayer contested IRS effort to obtain information pertinent to plaintiff's tax liability from customer of plaintiff), *cert. denied*, 454 U.S. 863 (1981); *United States v. Dema*, 544 F.2d 1373, 1377 (7th Cir. 1976) (AIA) (taxpayer moved for order restraining IRS from issuing or enforcing summons for records of taxpayer), *cert. denied*, 429 U.S. 1093 (1977); *Neilson v. United States*, 674 F.Supp.2d 248, 251 (D.D.C. 2009) (AIA) (taxpayer sought to enjoin IRS from using information regarding taxpayer gathered from financial institutions)).

The DMA's claims are unlike such suits. DMA's members are not Colorado taxpayers challenging the tax liability of any person, nor does DMA seek review in federal court to bypass an administrative remedy established by the State.[4] Moreover, the Colorado

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[4] The Colorado Act includes no procedures for appeal by affected retailers. The Tenth Circuit incorrectly concluded that Colorado provides an administrative appeal under the tax or penalty refund provisions of the Colorado tax code, as the DMA demonstrated in its Petition for Rehearing En Banc. *See* J.A. 23. Neither of the administrative remedies hypothesized by the Tenth Circuit is applicable. *See id.* DMA has not, however, contested the availability of a "plain, speedy and efficient

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Act's requirements do not constitute the "assessment, levy or collection" of a state tax. The DMA's challenge to these regulatory requirements is straightforward and does not obscure an alternative, tax-motivated objective.

B. The TIA's Language And Purpose Provide The Framework For Determining Those Cases In Which Federal Jurisdiction Is Barred.

In evaluating whether a federal court may exercise jurisdiction over a suit that touches upon state taxes, the language of the Act, along with its well-established purpose and long history of enforcement, must provide the proper framework:

- First, does the lawsuit fit within that category of cases which comprise the broad core of the TIA, *i.e.*, a suit by a taxpayer (or someone suing on the taxpayer's behalf) challenging either his tax liability or a state's effort to recover tax amounts due the state, by a means other than the established state procedure for challenging state taxes?
    - If the answer is "Yes," then the TIA applies to bar federal court jurisdiction. *See, e.g., Tully v. Griffin*, 429

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remedy" under Colorado's declaratory judgment statute, Colo. Rev. Stat. § 13-51-101 *et seq.*

U.S. 68 (1976); *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981).

- If the answer is "No," *i.e.*, the suit is either filed by a non-taxpayer or by a taxpayer who does not directly contest his state tax liability, then the TIA may still preclude federal court jurisdiction, in the following circumstances:
    - If a non-taxpayer plaintiff is suing to oppose another person's state tax liability, then the TIA will bar federal court jurisdiction. *See, e.g., Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007) (direct challenge to license plate tax paid by motorists other than plaintiffs).
    - If the plaintiff is a taxpayer, who, rather than directly challenging the recording or enforcement of his tax liability, instead brings an action that anticipates the assessment, levy or collection of his taxes, or employs clever pleading in an effort to avoid the application of the TIA, then the TIA will also preclude federal court jurisdiction. *See, e.g., Blangeres v. Burlington N., Inc.*, 872 F.2d 327 (9th Cir. 1989) (employees' suit to bar reporting of earnings information

> in order to preclude income tax assessment); *Czajkowski v. Illinois*, 460 F. Supp. 1265 (N.D. Ill. 1977) (action to prevent collection of cigarette tax by depriving state officials of funds and authority to enforce the tax).

The above framework makes clear that the TIA is not a bar to federal court jurisdiction where all of the following elements are present:

1. The plaintiff is not a taxpayer;
2. The plaintiff is not opposing his own or any other person's tax liability (*i.e.*, the plaintiff is an "outsider"); and
3. The plaintiff is challenging a regulatory burden that is not itself the "assessment, levy or collection" of a tax.

The fact that a regulation may be collateral to a state's tax regime, or intended to aid in the administration of a state's tax system, does not convert that regulation into "the assessment, levy or collection" of a state tax. The TIA sets a boundary line for federal court jurisdiction. State laws directed at non-taxpayers, along with the obligations that arise under them, that may be "related to" or "preliminary to" or "complementary of" state tax laws are not the same as the exercise of a state's authority to assess, levy or collect taxes. While such third-party obligations may be viewed as supportive of state tax laws, they nonetheless fall outside the jurisdictional barrier established by the TIA.

C. Suits By Outsiders Are Unlikely To Trigger The TIA's Jurisdictional Bar.

As the Court recognized in *Hibbs* and explained in *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 430 (2010), suits by "outsiders" to a state tax, whose liability is not a relevant factor in the case, are a "poor fit" for the TIA. The Respondent agrees that a plaintiff's status as an outsider is relevant to the applicability of the TIA, but disputes that the DMA qualifies as an outsider to the Colorado use tax, on the grounds that its members have relevant information regarding taxable transactions. Resp. Br. at 32. The Court in *Levin* made clear, however, that the plaintiffs in that case were not "outsiders," because their suit expressly contested the measure of their tax liability in comparison to their competitors' liability. *Id.* at 430. DMA and its members, however, do not contest their own tax liability or the liability of their competitors or customers.

The Respondent's proposed "possesses relevant information" or "party to the transaction" standard fails to provide a clear rule and would lead to uncertainty in the application of the TIA by district courts. The Respondent's proposed test fails to provide a basis for differentiating between retailers and credit card companies or payment processors with respect to the use tax. A credit card issuer is not a party to a sales transaction for which it provides the medium of payment, but it possesses all, or nearly all, of the same information a retailer maintains concerning a consumer transaction (identity and address of purchaser, amount of transaction, and in some cases products purchased). Furthermore, if having relevant information were the test, it is unclear what type or amount of information the third party must possess before its claims are barred from review by a federal court. The Respondent argues that the First Circuit's decision in *UPS* is compatible with her proposed rule, because the common carrier in that case was not a party to the underlying sales transaction. Resp. Br. at 32-33. But a common carrier will always have information reflecting the identity of the purchaser receiving the product, the lack of which is the primary impediment claimed by the State in being able to enforce its use tax. Respondent also agrees that *Florida Bankers Ass'n v. U.S. Dep't of Treasury*, 2014 WL 114519 (D.D.C. Jan. 13, 2014) was correctly decided, even though the information sought by the IRS for exchange with foreign governments directly promoted U.S. tax compliance by identifying false claims of non-residency made by taxpayers "in order to avoid U.S. taxation." *Id.* at *3. A standard associated with the amount of information possessed by a non-taxpayer is not workable as a jurisdictional rule.

Contrary to the Respondent's assertion, this Court has never held that the TIA applies "regardless of the identity of the plaintiffs." Resp. Br. at 27. *Franchise Tax Board of California v. Alcan Aluminum,* *Ltd.*, 493 U.S. 331 (1990), does not stand for the proposition that the status of the plaintiff is irrelevant, but rather for the core principle that the TIA bars suits by taxpayers and their proxies that seek to contest tax liability and have an available state remedy. The indirect sole shareholder in *Alcan* was plainly not an "outsider" because it had complete control over the taxpayer. *Id.* at 338-39. The DMA's members, by contrast, have no control over their customers. The DMA, moreover, does not contest the use tax liability of its members' Colorado customers or the validity of the use tax – it challenges the regulatory obligations imposed by the Colorado Act directly upon out-of-state retailers. Like *Hibbs*, the DMA's suit is a poor fit for the TIA.

III. CASES INTERPRETING THE AIA DO NOT DICTATE DISMISSAL OF THE DMA'S SUIT.

The Respondent's reliance upon cases interpreting the AIA is misplaced. The AIA, while sharing a similar purpose with the TIA of requiring plaintiffs to pursue available administrative remedies for challenging their tax liability, is broader and more restrictive than the TIA. The AIA's application to certain suits challenging IRS actions that would "culminate in the assessment" of taxes (Resp. Br. at 23-24) does not warrant dismissal of DMA's claims.

Legislating against the backdrop of the AIA, Butler Act, and Johnson Act, Congress chose different words in the TIA, appropriate to its particular purpose of limiting federal court jurisdiction over suits by taxpayers challenging their state tax liability. The phrase "for the purpose of restraining" in the AIA was adopted by Congress in the Butler Act in 1927, only ten years prior to passage of the TIA. Rather than employing that phrase again in the TIA, however, Congress selected the more precise terms of equity jurisdiction, "enjoin, suspend or restrain," which it had used in the Johnson Act in 1934. At the same time, Congress did not choose to include words to expand the second operative clause of the TIA in the same manner it did in the Johnson Act with respect to orders of state utility commissions. *See Hibbs*, 542 U.S. at 105 n.7 (noting that the Johnson Act's use of "the operation of, or compliance with"). Had Congress intended the broader meaning advanced by the Respondent, it could have included (or could now, in revising the TIA, readily add) words to that effect, *e.g.*, "The district courts shall not enjoin, suspend or restrain *any provision related to* the assessment, levy or collection of any tax under state law."

The AIA's limitation on access to any court "for the purpose of restraining" the assessment or collection of any federal tax gives the AIA a more expansive reach with respect to suits by taxpayers and nontaxpayers alike. Pet'r Br. at 32-34. In *Bob Jones University v. Simon*, 416 U.S. 725, 739 (1974) and *Alexander v. 'Americans United,' Inc.*, 416 U.S. 752, 760-61 (1974), the Court found that the institutions in each case brought suit in order to reduce (*i.e.*, "for the purpose of restraining") the tax liability of interested third parties (the plaintiffs' contributors), and held that their suits were barred under the AIA's plain language.

In contrast, the Court's TIA jurisprudence has recognized that a suit brought by plaintiffs who do not challenge their own tax liability are not outside of the district courts' jurisdiction when the suit implicates neither the TIA's plain terms, nor its underlying purposes. *Hibbs*, 542 U.S. at 104-08; *Levin*, 560 U.S. at 430 (discussing *Hibbs*). In this case, the DMA challenges *no one's* tax liability, so even apart from the differences in language between the AIA and TIA, *Bob Jones* and '*Americans United*' do not support extending the TIA's reach to a case where neither the Act's language nor its purpose preclude federal court jurisdiction.

The differences in scope between the AIA and TIA are consistent with the underlying objective of Congress associated with each statute. The AIA was adopted pursuant to Congress's taxing power as part of the internal revenue code. Its purpose was to eliminate court challenges altogether, in both state and federal courts, in all but those cases expressly exempted by Congress. As the Court has emphasized, the necessity of a "complete system" of taxation requires that the manner in which taxes may be challenged must be determined exclusively by Congress. *Taylor v. Secor*, 92 U.S. 575, 613 (1875). In enacting the TIA, Congress was exercising its power to determine the jurisdiction of the lower federal courts, but was not purporting to craft a closed system of state taxation. The TIA contemplates both that equitable actions (in state court) may be an available remedy, if the state system so provides, and that suits in federal court may be required, where the state does not afford a "plain, speedy and efficient remedy." The AIA is, by its very nature, a more sweeping prohibition against challenges to federal taxes than is the TIA with respect to state taxes.

IV. THE RESPONDENT FAILS TO DISTINGUISH CONFLICTING CIRCUIT COURT AUTHORITY.

The Tenth Circuit's decision below is at odds with the First Circuit's decision in *UPS* and the Second Circuit's decision in *Wells*. The Respondent, however, does not argue that either case was wrongly decided. *See* Resp. Br. at 36-37. Thus, with respect to the two leading circuit court decisions that define the limits on the meaning of "collection" of a tax for purposes of the TIA, and which contradict the Tenth Circuit's conclusion that the TIA applies to measures which merely promote voluntary compliance by taxpayers, *see* Pet'r. Br. at 39-45, the Respondent fails to refute the reasoning of either court.

Instead, she suggests that the regulation at issue in each case was more coercive than the notice and reporting obligations imposed on out-of-state retailers under the Colorado Act. Resp. Br. at 36-37. There is no question that the Colorado Act is coercive. The law does not afford affected retailers a "choice," as the Respondent repeatedly insists; it compels retailers to forego their constitutional rights under *Quill* or face adverse consequences. But whether the Colorado Act is more, or less, coercive than the laws at issue in *UPS* and *Wells* is not the point. None of these laws' requirements constitute the "collection" of a tax within the meaning of the TIA.

V. THE DOCTRINE OF COMITY DOES NOT APPLY.

The TIA is rooted in the principles of comity. *Levin*, 560 U.S. at 423-24 (discussing the origins of the TIA). While the former is a jurisdictional rule, the latter is a prudential doctrine. *Id.* at 432. The Respondent, rather than asserting comity (or the TIA), elected to "seek an expedited ruling" from the courts below. *See* Resp. Opp. to Pet. for Cert. at 5-6 n.1; Appellant's Brief at 31 n.3. Therefore, this Court need not address comity now. *Levin*, 450 U.S. at 432 (federal courts need not consider comity where the State itself elects to proceed in a federal forum).

Comity is not a bar to the DMA's claims in any event. None of the interests which underlie the doctrine of comity are implicated by its claims. Pet'r Br. at 59-64. The DMA's suit does not challenge a state tax assessment, is not bypassing state procedures, presents no issues requiring the interpretation of state law, and will not affect tax administration in any manner differently than would an identical action in state court. Moreover, the Colorado Act targets exclusively out-of-state, non-taxpayers. The DMA's challenge to the law's regulatory requirements is straightforward and does not obscure an alternative, tax-motivated objective. The concerns of non-interference with state affairs that motivate comity do not apply, and thus "nothing would be lost in the currency of comity or state autonomy by permitting [this case] to proceed in a federal forum." *Levin*, 560 U.S. at 431.[6]

The Respondent focuses her comity argument on the factors discussed in *Levin*. In order for comity to dictate dismissal of the DMA's suit, however, no single *Levin* factor is sufficient; it is the "confluence" of all the factors that "demand[s] deference to the state adjudicative process." *Levin*, 560 U.S. at 431-32 (brackets added). None of the *Levin* factors applies here.

Of "key importance" is the third *Levin* factor, *i.e.*, whether the claims in question afford alternative forms of possible relief by a reviewing court. *Id.* at 426-28. The Respondent argues that there are multiple possible remedies because a Colorado state court could "sever any discrete portion" of the Colorado Act that is ruled to be unconstitutional. Resp. Br. at 43.

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[6] Moreover, where comity is not a bar to the exercise of federal court jurisdiction, the TIA cannot be. *See National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 590 (1995) (the TIA is but a "partial codification" of comity).

Severance, however, is not an option unique to state courts; a federal court also has an obligation to examine severance. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329-31 (2006) (in finding that a portion of a state law is unconstitutional, court must determine whether severance is appropriate). If severance of one or more of the elements of the Colorado Act is required to sustain its constitutionality, a federal court will enter that remedy.

The Respondent's arguments regarding the other *Levin* factors are equally unavailing. Respondent claims, with regard to the second factor, that the DMA's suit seeks to secure both competitive and litigation advantages for its members. Resp. Br. at 42-43. To the contrary, DMA seeks to prevent Colorado from imposing unconstitutional regulatory requirements upon its affected members. As for the first *Levin* factor, the Respondent claims that deference to the state courts is required because the DMA's suit does not concern any fundamental right. *Id.* at 42. The Court in *Levin* noted, however, that retention of federal court jurisdiction is appropriate in cases involving economic legislation that "employ[s] classifications subject to heightened scrutiny *or* impinge[s] on fundamental rights." 560 U.S. at 426 (italics and brackets added). The Colorado Act, on its face, imposes different obligations on out-of-state retailers than it imposes on in-state retailers, thus triggering "strictest scrutiny" under the Commerce Clause. *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 101 (1994) (facial discrimination triggers scrutiny so stringent it may be a "fatal defect") (citation omitted). Federal courts need not give deference to state courts when reviewing state laws that discriminate against interstate commerce on their face. The doctrine of comity is not applicable in this case.

◆

CONCLUSION

The decision of the Tenth Circuit Court of Appeals should be reversed and the case remanded for further proceedings.

November 17, 2014

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

No. 13-1032

In The Supreme Court of the United States

DIRECT MARKETING ASSOCIATION,
Petitioner,

v.

BARBARA BROHL
IN HER CAPACITY AS EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF REVENUE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Tax Injunction Act, 28 U.S.C. § 1341, bars federal court jurisdiction over a suit brought by non-taxpayers to enjoin the informational notice and reporting requirements of a state law that neither imposes a tax nor requires the collection of a tax, but serves only as a secondary aspect of state tax administration.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation, representing more than 300,000 direct members and an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent its members' interests before Congress, the Executive Branch, and the courts, including this Court. To that end, the Chamber regularly files *amicus curiae* briefs in cases before this Court that raise issues of national concern to American business, including several cases involving the scope of federal court jurisdiction. *See, e.g.*, *Ford Motor Co. v. United States*, No. 13-113; *Sprint Communications, Inc. v. Jacobs*, No. 12-815; *Walden v. Fiore*, No. 12-574; *Daimler AG v. Bauman*, No. 11-965.

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[1] This brief is filed with the written consent of all parties through universal letters of consent on file with the Clerk. No counsel for either party authored this brief in whole or in part, and no person or entity other than the *amicus*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

This is one such case. The Chamber and its members are concerned that the Tenth Circuit's decision, if upheld, will allow parties (including state regulators) to use the Tax Injunction Act (28 U.S.C. § 1341) to avoid federal jurisdiction in favor of a state forum in cases far afield from the text or purpose of that Act. The Tenth Circuit's interpretation requires a court to make predictions regarding the indirect effect a plaintiff's claims might have on state tax revenues, and precludes federal court jurisdiction whenever that prediction suggests even an attenuated effect on state coffers—even when the suit does not implicate the plaintiff's own tax liability or seek to change anyone's tax liability. That expansive and indeterminate interpretation risks substantially undermining the ability of the Chamber's members to vindicate federal rights in a federal forum.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Under the Tenth Circuit's rule, the Tax Injunction Act (TIA or Act) bars federal courts from exercising jurisdiction over any suit that, if successful, would in any way "limit, restrict, or hold back the state's chosen method of enforcing its tax laws and generating revenue," Pet. App. A-17—even in cases, such as this one, where (i) the plaintiff is not a state taxpayer and does not seek to challenge its own tax liability in the State; (ii) the suit does not call into question the State's authority to assess or collect taxes; and (iii) the relief sought would have no effect on any taxpayer's liability to the State, or itself decrease state revenue.

Neither congressional intent nor this Court's precedents can support the Tenth Circuit's expansive interpretation of the Act. Both Congress and this Court have made clear that although the Act may be "grounded in the need of States to administer their fiscal affairs without undue influence from federal courts," *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821, 832 (1997), respect for state taxing authority does not per force insulate "all aspects of state tax administration" from federal-court review. *Hibbs v. Winn*, 542 U.S. 88, 105 (2004) (internal quotation marks omitted). Instead, "in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority." *Id.* at 104-105. Accordingly, as this Court has made clear, the Act's jurisdictional bar is triggered only (i) when "state taxpayers seek federal-court orders enabling them to avoid paying state taxes" *and* (ii) when the direct legal result would be a decrease in state tax revenue. *Id.* at 107.

Neither jurisdiction-barring criterion is present here. Petitioner is not a Colorado taxpayer, and as the Tenth Circuit acknowledged, "[e]ven if DMA's constitutional attack on the notice and reporting obligations were successful, Colorado consumers would still owe use taxes by law." Pet. App. A-18. Colorado's use-tax notice and reporting requirements do not themselves reap any tax revenue for the State. *See id.* at A-5-7. Instead, they function simply as a mechanism for forcing out-of-state businesses, like Petitioner's and the Chamber's members, to "notify consumers of their duty to pay [use] tax and to garner information on consumer purchases to ensure tax compliance through audits." *Id.* at A-23.

This Court has never held that the TIA protects such a "general use of coercive power" from federal-court review, ***Hibbs***, 542 U.S. at 109 (quoting ***Wells v. Malloy***, 510 F.2d 74, 77 (2d Cir. 1975) (Friendly, J.)), just because a State has "determined [it] to be a likely method of securing [tax] payment[s]," ***Wells***, 510 F.2d at 77. There is no good reason to make that unprecedented leap based on the Tenth Circuit's expansive and indeterminate view of the TIA—a view that is untethered from the TIA's text, Congress's intent, and this Court's precedent. Rather, the Court should reaffirm that the TIA's jurisdictional bar is limited to cases in which taxpayers seek to sidestep state procedures for challenging state tax liability by seeking *ex ante* relief in federal court.

To do otherwise would only invite confusion, which this Court has recognized is particularly troubling in the context of jurisdictional rules. It would also divest federal courts of jurisdiction over important federal questions in cases that have no impact on the amount of tax owed under state law. Requiring federal courts to oust parties based on uncertain predictions of how taxpayers might respond to particular procedures or incentives would only embolden those seeking a more hospitable forum to posit evermore attenuated chains of possible effect on state tax revenue. This Court can avoid the inevitable proliferation of TIA litigation—turning on the predictions of dueling behavioral economists—by adhering to the clear rule its precedents already establish: the Act applies only when a state taxpayer seeks a federal-court order that would decrease the amount of taxes the taxpayer owes the State.

ARGUMENT

I. THE TENTH CIRCUIT'S EXPANSIVE READING OF THE TAX INJUNCTION ACT CONTRAVENES THE ACT'S TEXT, CONGRESSIONAL INTENT, AND THIS COURT'S PRECEDENT.

A. The TIA Applies Only To Actions By Taxpayers Contesting State Tax Liability.

The text of the TIA, the context in which the law was enacted, and the Act's legislative history all make clear that "[t]hird-party suits not seeking to stop the collection (or contest the validity) of a tax *imposed on plaintiffs*" are simply "outside Congress' purview." *Hibbs*, 542 U.S. at 104.

1. *The TIA's text bars only actions that would directly thwart state tax "collection."*

The text of the TIA, on its face, indicates that the statute applies only to judicial remedies that would directly bar States from assessing or collecting taxes. The Act withholds federal court jurisdiction over suits that seek to "enjoin, suspend or restrain the assessment, levy, or collection of any tax." 28 U.S.C. § 1341. There is no argument in this case that Petitioner's suit would "enjoin," "suspend," or "restrain" in any way the "assessment" or "levy" of a tax. That is because the terms "assessment" and "levy" refer to specific legal methods used by a State to record and obtain the amount of taxes owed. *See Hibbs*, 542 U.S. at 100-101. The State of Colorado would remain free to employ those methods with respect to the same tax liability regardless of the outcome of this suit.

Under the canon of *noscitur a sociis*, "words grouped in a list should be given related meaning." *Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990) (internal quotation marks omitted). As this Court has recognized, the term "collection" refers to "methods similar to assessment and levy, *e.g.*, distress or execution * * * that would produce money or other property directly, rather than indirectly through a more general use of coercive power." *Hibbs*, 542 U.S. at 109 (quoting *Wells*, 510 F.2d at 77). Here, of course, a victory for Petitioner would not prevent the State of Colorado from employing direct collection methods such as distress or execution any more than it would prevent assessments or levies.

Reading the term "collection" as limited to direct legal methods employed by the State, rather than as encompassing any practical effect on ultimate tax receipts, also comports with the Act's history, the broader statutory context, and this Court's precedents.

2. *The Tenth Circuit's approach ignores the statutory history of the TIA.*

Prior to the TIA's enactment, it was "common practice" for state statutes to "forbid actions in State courts to enjoin the collection of State and county taxes" unless the affected taxpayer did so "in [a] refund action[] after payment under protest." S. Rep. No. 1035, 75th Cong., 1st Sess., at 1 (1937). The purpose of those statutes was largely prophylactic: by requiring taxpayers to first pay outstanding tax debts before challenging their tax liability in state courts, state legislatures "ma[de] it possible for the States and their various agencies to survive while long-drawn-out tax litigation [was] in progress." *Id.*; *see also* 81 CONG. REC. 1415, 1416 (1937) (statement of Sen. Bone).

That "state-revenue-protective" scheme, however, did little to prevent out-of-state taxpayers from invoking diversity jurisdiction to challenge their state tax liability *ex ante* in federal court. *Hibbs*, 542 U.S. at 104. Such attempts to "secure injunctive relief against the collection of taxes" without first paying into a State's coffers allowed "foreign [taxpayers] doing business in such States to withhold * * * taxes in such vast amounts and for such long periods of time as to seriously disrupt State and county finances." S. Rep. No. 75-1035, at 1-2. That painted the "highly unfair picture * * * of the citizen of the State being required to pay first and then litigate, while those privileged to sue in the Federal courts need only pay what they choose and withhold the balance during the period of litigation." *Id.*[2]

Congress fashioned the TIA to eliminate the ability of out-of-state taxpayers to sue first and pay later. Specifically, Congress sought to (i) "eliminate disparities between taxpayers who could seek injunctive relief in federal court * * * and taxpayers with recourse only to state courts"; and (ii) "stop taxpayers, with the aid of a federal injunction, from withholding large sums, thereby disrupting state government finances." *Hibbs*, 542 U.S. at 104; *see* S. Rep. No. 75-1035, at 2; *Jefferson County, Ala. v. Acker*, 527 U.S. 423, 435 (1999) ("Congress, it appears, sought particularly to stop out-of-state corporations from using diversity jurisdiction to gain injunctive relief against a state tax in federal court, an advantage unavailable to in-state taxpayers denied anticipatory relief under state law."); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 301 (1943) (similar).

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[2] *See* S. Rep. No. 75-1035, at 2; H.R. Rep. No. 1503, 75th Cong., 1st Sess., at 2 (1937) (both noting that "[t]he pressing needs of these States for this tax money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy"); *see also* David Fautsch, Note, *The Tax Injunction Act and Federal Jurisdiction: Reasoning from the Underlying Goals of Federalism and Comity*, 108 MICH. L. REV. 795, 801-802 (2010) (noting the increased prevalence of such suits after this Court's decision in *Ex parte Young*, 209 U.S. 123 (1908)).

Thus, far from "announc[ing] a sweeping congressional direction to prevent federal-court interference with all aspects of state tax administration," *Hibbs*, 542 U.S. at 105 (internal quotation marks omitted), Congress took aim at a specific problem then facing state taxing authorities: out-of-state taxpayers invoking federal courts' jurisdiction to obtain *ex ante* relief from state tax liability in a way that directly decreased state tax revenue. *See* Frederick C. Lowinger, Comment, *The Tax Injunction Act and Suits for Monetary Relief*, 46 U. CHI. L. REV. 736, 746 (1979) (TIA's legislative history suggests congressional intent to bar "only those [suits] that permitted the taxpayer to adjudicate the lawfulness of a levy prior to payment"). Contrary to the Tenth Circuit's suggestion, *see* Pet. App. A-13, nothing in the TIA's history indicates that Congress envisioned the Act's jurisdictional bar extending to suits that did not involve a taxpayer attempting to sue first and pay later. *See* Lowinger, 46 U. CHI. L. REV. at 746 ("The legislative history of the [Act] does not * * * demonstrate a congressional intention to remove from the federal courts all suits *involving* state or local tax administration, but only those that permitted the taxpayer to adjudicate the lawfulness of a levy prior to payment.").

3. The Tenth Circuit's approach is inconsistent with this Court's interpretation of analogous statutes.

Congress's focus on preventing taxpayers' direct assaults on state treasuries is confirmed by the purpose and language of similar statutes upon which the Act was based. *See Hibbs*, 542 U.S. at 104. In particular, Congress modeled the TIA after the federal Anti-Injunction Act, 26 U.S.C. § 7421, which generally deprives courts of jurisdiction over suits brought "for the purpose of restraining the assessment or collection" of any federal tax. *Id.* § 7421(a); *see* Act of Mar. 2, 1867, ch. 169, § 10, 14 Stat. 475.

This Court has long recognized that the Act's "manifest purpose" is to "permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund." *Enochs v. Williams Packing & Navigation Co., Inc.*, 370 U.S. 1, 7 (1962). In other words, like the TIA, the Anti-Injunction Act was originally designed to "preclude[] only suits brought by taxpayers to restrain the United States from assessing or collecting * * * taxes." *Jefferson County*, 527 U.S. at 434-435; *see also Miller v. Standard Nut Margarine Co. of Florida*, 284 U.S. 498, 509 (1932) (noting that Anti-Injunction Act is "declaratory of the principle" that "a suit will not lie to restrain the collection of a tax upon the sole ground of its illegality," because "such suits would enable those liable for taxes in some amount to delay payment or possibly to escape their lawful burden").

Adopting the Tenth Circuit's expansive view of the TIA's scope would thus decouple the Act from its federal-tax-law counterpart, and contravene the well-settled principle that statutes with similar language that "share a common raison d'etre" "should be interpreted *pari passu*." *Northcross v. Board of Educ. of Memphis City Schs.*, 412 U.S. 427, 428 (1973); *cf. also Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").

Moreover, the Anti-Injunction Act has since been amended expressly to bar suits for injunctive relief not just by taxpayers, but "by any person, whether or not such person is the person against whom such tax was assessed," 26 U.S.C. § 7421(a); *see* Federal Tax Lien Act of 1966, Pub. L. No. 89-719, § 110(c), 80 Stat. 1125, 1144. The very existence of that amendment draws into sharper relief the notion that in both statutes, "Congress had in mind challenges to assessments triggering collections, *i.e.*, attempts to prevent the collection of revenue" through direct challenges to the imposition of tax liability, *Hibbs*, 542 U.S. at 103-104 & n.5. And the fact that Congress has not similarly expanded the TIA's proscriptive reach to encompass third-party claims—particularly after this Court's decision in *Hibbs*—only reinforces the idea that Congress chose to focus its "state-revenue protective" efforts in the TIA on taxpayers' attempts to use federal courts to skirt or delay their state tax obligations. *See id.* at 104; *see also id.* at 112 (Stevens, J., concurring) ("[P]rolonged congressional silence in response to a settled interpretation of a federal statute provides powerful support for maintaining the status quo.").

Congress was also aware of the broader terms of the Johnson Act, 28 U.S.C. § 1342, which prohibits federal district courts from entertaining actions to "enjoin, suspend or restrain *the operation of, or compliance with*" public-utility rate orders made by state regulatory bodies. *Id.* (emphasis added); *see* S. Rep. No. 75-1035, at 2 (discussion of Johnson Act in TIA legislative history). If Congress had similarly prohibited federal courts from hearing challenges to "the operation of, or compliance with" state tax laws, the TIA's proscriptive scope would encompass a wider swath of lawsuits. Congress's failure to use similar language in the TIA further refutes the Tenth Circuit's notion that the TIA reaches both "lawsuit[s] that would directly enjoin a tax" and lawsuits that "would enjoin a procedure [that] * * * aims to enforce and increase tax collection" more generally. Pet. App. A-19.

Congress eschewed such language in favor of a narrow proscription against direct "interference only with those aspects of state tax regimes that are needed to produce revenue—*i.e.*, assessment, levy, and collection." *Hibbs* 542 U.S. at 105 n.7; *see also id.* at 104 ("Third-party suits not seeking to stop the collection * * * of a tax *imposed on plaintiffs* * * * were outside Congress' purview."). The Tenth Circuit opined that the phrase "restrain the * * * collection of any tax under State law" (*see* Pet. App. A-26) can be stretched to include suits, like Petitioner's, that seek to challenge only "the operation of" a particular procedural facet of a State's tax scheme. But to accept the Tenth Circuit's overly broad conception of the TIA's scope would elide the words Congress chose with those that it rejected. *See Hibbs*, 542 U.S. at 105 n.7 (noting linguistic divide between Johnson Act and TIA).[3]

B. The Tenth Circuit's Expansive View Cannot Be Squared With This Court's Precedents.

The Tenth Circuit acknowledged that Petitioner's "lawsuit differs from the prototypical TIA case," Pet. App. A-18, because Petitioner is not a Colorado taxpayer and "Colorado consumers would still owe use taxes by law" "[e]ven if [Petitioner's] constitutional attack on the notice and reporting obligations were successful," *id.* Yet the court still held that the suit's "potential to restrain tax collection trigger[ed] the [TIA's] jurisdictional bar" because the suit might compromise "the state-chosen method to secure those taxes" from Colorado residents. *Id.* That broad conception of the TIA's scope runs headlong into this Court's decision in *Hibbs*, which made clear that the TIA applies "only in cases Congress wrote the Act to address, *i.e.*, cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes." 542 U.S. at 107.[4]

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[3] The Tenth Circuit's interpretation of the TIA's scope may extend beyond even the limits of a broader jurisdictional bar like that in the Johnson Act. The "Johnson Act * * * does not deprive the federal courts of jurisdiction to consider challenges to a state administrative agency's order that does not affect rates," *Evans v. New York State Public Serv. Comm'n*,, 287 F.3d 43, 46 (2d Cir. 2002), or bar federal courts from adjudicating federal statutory claims in cases implicating a public utility company's rate-making authority, *see GTE North, Inc. v. Strand*, 209 F.3d 909, 921-922 (6th Cir. 2000).

By minimizing this Court's considered guidance on the limits of the TIA's jurisdictional bar, the Tenth Circuit missed the mark in two respects. *First*, it dismissed this Court's pronouncement that the TIA does not apply outside of *taxpayer* suits seeking to reduce their *own* tax liability. *See* Pet. App. A-13-16. *Second*, it blurred the line between "tax collection" and general tax administration, thereby suggesting that the TIA bars federal-court review of any suit that would in any way "limit, restrict, or hold back the state's chosen method of enforcing its tax laws" rather than only suits seeking to decrease the amount of taxes owed. Pet. App. A-17-20. Both aspects of the Tenth Circuit's opinion conflict with this Court's precedents.

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[4] *See also, e.g., Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 425 (2010) ("The Act * * * 'restrain[ed] state taxpayers from instituting federal actions to contest their [own] liability for state taxes,' suits that, if successful, would deplete state coffers.") (second and third alterations in original) (citation omitted); Brianne J. Gorod, *Limiting the Federal Forum: The Dangers of an Expansive Interpretation of the Tax Injunction Act*, 115 YALE L.J. 727, 730-731 (2005) ("*Hibbs* thus affirms a commonsense and longstanding exception to TIA preemption: The TIA does not preempt federal jurisdiction when the taxpayer is a third party who is not attempting to avoid payment of taxes.").

1. The TIA does not apply outside of suits by taxpayers seeking to reduce their own tax liability.

The Tenth Circuit acknowledged this Court's declaration in *Hibbs* that, in enacting the TIA, Congress intended to foreclose suits in federal courts by "taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority," Pet. App. A-12. The Tenth Circuit further recognized that this Court has interpreted and applied the TIA only in those cases Congress wrote the Act to address, *i.e.*, "cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes." *See id.* at A-13 (internal quotation marks omitted). But the Tenth Circuit nevertheless held that this Court's considered discussion of Congress's intent and the Court's practice of barring only tax-collection-impeding suits by taxpayers did not limit the scope of the TIA. Rather, it treated that discussion as an extended sidebar to the "key question" of "whether the plaintiff's lawsuit seeks to prevent the State from exercising its sovereign power to collect * * * revenues." *Id.* at A-15 (internal quotation marks omitted).

The Tenth Circuit's analysis of and attempt to distinguish *Hibbs* are inapt. The "upshot of *Hibbs*," Pet. App. A-15, is in fact precisely what the court of appeals determined it was not: "Third-party suits not seeking to stop the collection (or contest the validity) of a tax *imposed on plaintiffs*" are not subject to the TIA's jurisdictional bar. 542 U.S. at 104. The pertinent lesson from *Hibbs*—confirmed by the TIA's legislative history (*see* pp. 7-9, *supra*)—is that the "relationship between the body that imposed the tax * * * and the bodies that owe the tax" is a vital aspect of the analysis. *See BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 502 (6th Cir. 2008) (citing *Hibbs* in finding TIA inapplicable where plaintiff was not trying to avoid tax liability and suit did not interfere with relationship between taxpayer and State).

To be sure, *Hibbs* also made plain that for purposes of the TIA, "'giving away a tax credit is a very different thing than assessing, levying or collecting a tax,'" Pet. App. A-15 (quoting *Hill v. Kemp*, 478 F.3d 1236, 1249 (10th Cir. 2007)). But it did so through an overarching exposition on the limitations of the TIA that is at least as applicable here. *See Hibbs*, 542 U.S. at 101-110; *see also Lynch ex rel. Lynch v. Alabama*, 568 F. Supp. 2d 1329, 1344 (N.D. Ala. 2008), *aff'd in part sub nom. I.L. v. Alabama*, 739 F.3d 1273 (11th Cir. 2014) ("[T]he Court's intent [in *Hibbs*] appears to have been to use the unique circumstances of the case—a third-party challenge to a state tax credit—as a vehicle for limiting the application of the Act itself" to taxpayers.). Indeed, the case for application of the TIA was arguably stronger in *Hibbs* than it is in this case: the plaintiffs in *Hibbs* were at least Arizona taxpayers seeking to upend a facet of Arizona tax law; not, like Petitioner here, third-parties with no skin in the state tax game. 542 U.S. at 92.

2. The Tenth Circuit improperly conflated "tax collection" and general tax administration.

By asking whether Petitioner's suit had the potential to "limit, restrict, or hold back the state's chosen method of enforcing its tax laws and generating revenue," Pet. App. A-17, the Tenth Circuit also impermissibly expanded what it means for a lawsuit to "restrain the * * * collection" of state taxes, 28 U.S.C. § 1341. *See* Pet. App. A-17-20. The Tenth Circuit read tax "collection" under the TIA to sweep in any procedure that might encourage a State's taxpayers to pay the tax they owe or assist the State with undertaking potential enforcement measures, even if the procedure is only tangential to the tax-collection scheme and does not itself collect a tax or alter tax liability. *See id.* at A-19 ("The purposes of the TIA apply both to a lawsuit that would directly enjoin a tax and one that would enjoin a procedure required by the state's tax statutes and regulations that aims to enforce and increase tax collection. Either action interferes with state revenue collection and falls within the 'traditional heartland of TIA cases' that dismiss federal lawsuits to protect state coffers.").

This Court, however, has declined to read the TIA so broadly. As noted above (p. 6, *supra*), the Court in *Hibbs* made clear that "in speaking of 'collection,' Congress was referring to methods similar to assessment and levy, *e.g.*, distress or execution * * * that would produce money or other property directly, rather than indirectly through a more general use of coercive power." 542 U.S. at 109 (quoting *Wells*, 510 F.2d at 77) (alteration in original). In other words, "Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law going to the validity of the particular taxes imposed upon them," *id.*, not challenges to more generalized aspects of a State's tax plan that might indirectly assist the State in collecting tax revenue. *See Wells*, 510 F.2d at 77 (rejecting as overbroad an interpretation of "tax collection" that would include "anything that a state has determined to be a likely method of securing payment."); *cf. United Parcel Service Inc. v. Flores-Galarza*, 318 F.3d 323, 331 (1st Cir. 2003) ("Not every statutory or regulatory obligation that may aid the Secretary's ability to collect a tax is immune from attack in federal court by virtue of the Butler Act's jurisdictional bar."). In distinguishing prior suits barred by the TIA, the Court explained: "All involved plaintiffs who mounted federal litigation to avoid paying state taxes (or to gain a refund of such taxes)"; none held that the TIA barred taxpayers (let alone anyone else) from using federal courts to challenge other "aspects of state tax administration" that did not directly impede a State's ability to collect tax revenue from its residents. *Hibbs*, 542 U.S. at 105, 106 (internal quotation marks omitted).

The Tenth Circuit acknowledged that Petitioner's challenge to Colorado's notice and reporting requirements would not directly prevent Colorado from collecting use taxes from its residents. Pet. App. A-18. It nevertheless held that the TIA barred the suit because, if successful, the "state-chosen method" of securing information that might facilitate collection of "those taxes would be compromised." *Id.*; *see also id.* at A-23 (noting that the "challenge[d] laws

[were] enacted to notify consumers of their duty to pay [use] tax and to garner information on consumer purchases to ensure tax compliance through audits"). The TIA, however, does not bar suits seeking to enjoin such "general use[s] of coercive power" just because they are bound up in a State's tax code. *See Hibbs*, 542 U.S. at 109; *cf. United Parcel Service*, 318 F.3d at 331. Instead, the challenged act of "collection" must be one that "would produce money or other property directly." *Hibbs*, 542 U.S. at 109. In other words, the lawsuit must be an attempt to sue first and pay later. As both the Tenth Circuit and Respondent confess, Petitioner's suit does not fit that bill. *See* Pet. App. A-18-19; Br. in Opp. 14.

That practical restriction on the TIA's scope, moreover, provides a crucial limiting principle that is otherwise lacking from the Tenth Circuit's interpretation of the Act's scope. All suits challenging a facet of a State's tax scheme necessarily "limit, restrict, or hold back the state's chosen method of enforcing its tax laws and generating revenue" (Pet. App. A-17) to some extent. That is because all such suits call into question a State's considered judgment concerning from whom, and under what circumstances, tax revenue should be exacted. But this Court has made clear that notwithstanding "its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations," *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522 (1981) (internal quotation marks omitted), the TIA was never intended to insulate "all aspects of state tax administration" from federal court review, *Hibbs*, 542 U.S. at 105-106 (internal quotation marks omitted). Tying the concept of "tax collection" to laws that directly result in tax liability and increased state revenue thus prevents the exception from swallowing the rule, and ensures that the TIA restricts federal-court review of cases involving a State's tax scheme only to the extent that Congress intended.

II. THE TENTH CIRCUIT'S UNPRECEDENTED RULE WOULD ENCOURAGE MORE JURISDICTIONAL TIA LITIGATION IN MULTIPLE CONTEXTS.

The Tenth Circuit's test for application of the TIA boils down to this: can a party (taxpayer or not) articulate some chain of effects that links federal equitable relief to a reduction in the amount of tax revenue a State collects, no matter how attenuated and irrespective of any legal effect on total tax liability. That test impairs important interests in easy-to-administer jurisdictional rules and fidelity to congressional intent to preserve the federal forum except as provided by the TIA's limited exception.

A. The Tenth Circuit's Indeterminate Approach Is Inconsistent With The Need For Clear Jurisdictional Rules.

As this Court has recognized, "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Id.* They encourage forum shopping and "gamesmanship," as well as impair the predictability that is critical to "corporations making business and investment decisions." *Id.*

The line drawn by the TIA, as interpreted by this Court in *Hibbs*, is simple and predictable: taxpayer suits seeking to avoid payment of state taxes through judicial relief that would reduce taxpayer liability must be brought in state court. *Hibbs*, 542 U.S. at 107. For other suits seeking to vindicate federal claims—even those touching upon "aspects of state tax administration"—the federal forum remains available. *Id.* at 105.

The Tenth Circuit's test, on the other hand, is neither simple nor predictable. The Tenth Circuit would have federal courts adjudicate whether federal judicial relief—that concededly does not change taxes due to the state treasury *at all*—might cause (non-party) taxpayers to pay less than what they owe or would otherwise pay. That would turn federal judges into armchair behavioral economists, wading into factual disputes about the likely behavior of taxpayer populations in response to the elimination of this or that incentive or ancillary tax-related procedure.

The Tenth Circuit elsewhere has recognized that when a suit would enjoin a particular tax, the TIA bars federal jurisdiction notwithstanding a party's predictive judgment that the injunction would actually *increase* state tax revenues overall. *See Hill*, 478 F.3d at 1250 (rejecting interpretation of TIA that would require "judges * * * to become second rate, supply-side economists, hazarding guesses that enjoining this or that revenue raising measure would help rather than hurt overall tax collections"). The inverse is also true. When a suit challenges no state tax, and undisputedly would not alter any taxpayer's liability or obligation to pay (or even the required manner and timing of payment), it simply does not "restrain the * * * collection of any tax" within the meaning of the TIA.

B. The Tenth Circuit's Approach Would Encourage Unjustified Attempts To Avoid A Federal Forum.

Such unpredictability and complexity in applying the TIA is in no way required by the Act or its purpose. On the contrary, as this case demonstrates, the Tenth Circuit's rule encourages invocation of the TIA in cases that do not further Congress's desire to ensure that taxpayers do not seek federal-court intervention to nullify their state tax liability.

In so doing, the Tenth Circuit's rule could deprive businesses of a federal forum to hear federal-question disputes regarding state regulations, merely on the basis of some connection to state measures that encourage residents to pay their taxes. Suppose that a State imposed any number of burdensome regulations on commercial transactions with a State's consumers—for example, precluding businesses from completing sales, providing services, or delivering packages—unless the consumer provided evidence that he is up-to-date on his state taxes. *Cf. United Parcel Service*, 318 F.3d at 331-332 (holding that the Butler Act did not bar federal court review of a Puerto Rico law precluding common carriers from delivering packages unless customer provided evidence that excise taxes had been paid). That would likely incentivize consumers to pay their taxes, but Congress did not intend the TIA so broadly to oust federal court review of such general business regulation. *See Hibbs*, 542 U.S. at 109. Under the Tenth Circuit's rule, however, States and private litigants would have every incentive to employ the TIA as a means of doing so.

Litigants have sought to stretch the TIA beyond its intended scope in other contexts as well. For example:

- Companies have faced TIA objections in First Amendment suits challenging state laws precluding them from informing customers of the amount of taxes included in the price of a given service, even though they did not dispute the obligation to collect or pay the tax. *See, e.g.*, *BellSouth*, 542 F.3d at 501-502; *Mobil Oil Corp. v. Dubno*, 639 F.2d 919, 922 (2d Cir. 1981). Defendants in such cases have sought to rely on their predictive judgments that informing consumers of the tax amount would somehow reduce state revenues. *See BellSouth*, 542 F.3d at 503.
- Private plaintiffs challenging an employer's tax-withholding practice have contended—relying in part on the Tenth Circuit's decision in this case—that the TIA bars removal to federal court despite conceding that the practice had no effect on the amount of state tax they owed or ultimately paid. Indeed, on appeal in that case, plaintiffs seek to undo a final federal court merits judgment on such tenuous TIA grounds. *See Fredrickson v. Starbucks Corp.*, 980 F. Supp. 2d 1227, 1233

(D. Or. 2013), *appeal docketed*, No. 13-36067 (9th Cir. Nov. 13, 2013).

Courts (other than the outlier Tenth Circuit), remaining faithful to the clear line drawn in *Hibbs*, have rejected such claims thus far. As the Sixth Circuit has explained, the TIA "does not strip federal courts of jurisdiction over all claims that might, after this or that happens, have *some* negative impact on local revenues." *BellSouth*, 542 F.3d at 503-504. Were this court to adopt the Tenth Circuit's expansive approach, however, such invocations of the TIA would surely gain traction—at least with litigants eager to avoid a federal forum. Because much state business regulation has some revenue-raising aspect, adopting the Tenth Circuit's test would invite extensive and wasteful litigation over the indirect tax effects of lawsuits and risk allowing the TIA exception to swallow the general rule that a federal court should be available for federal claims.

* * * * *

The Tenth Circuit's interpretation of the TIA finds no support in the Act or its purposes, and if accepted, would expand the Act's scope in a way that conflicts with this Court's precedents and increases jurisdictional uncertainty across a variety of contexts. That is not a cost that businesses—particularly out-of-state businesses like Petitioner's or the Chamber's members—should have to bear.

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit should be reversed.

Respectfully submitted.

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September 16, 2014

AMICUS
CURIAE
BRIEF

No. 13-1032

IN THE

Supreme Court of the United States

DIRECT MARKETING ASSOCIATION,
Petitioner,

v.

BARBARA BROHL,
IN HER CAPACITY AS EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF REVENUE,
Respondent.

**On Writ of Certiorari
to the Tenth Circuit Court of Appeals**

BRIEF *AMICUS CURIAE* OF COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Council On State Taxation ("COST") is a non-profit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. COST represents nearly 600 multistate businesses in the United States, including companies in numerous industries. As *amicus*, COST has participated in many of the significant tax cases to come before this Court in recent years, including: *Levin v. Commerce Energy*, 560 U.S. 413 (2010), *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1 (2009), *MeadWestvaco Corp. v. Illinois Department of Revenue*, 553 U.S. 16 (2008), and *CSX Transportation, Inc. v. Georgia State Board of Equalization*, 552 U.S. 9 (2007).

COST's membership has a vital interest in ensuring that states do not impede the rights of all businesses to engage in commerce in the national market. To that end, it is important to COST members that the federal courts remain available to resolve constitutional challenges to state laws. The federal Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, should only apply in cases brought by taxpayers relating to the assessment or collection of state taxes; it is inappropriate to judicially expand its application to cases not contesting a tax liability or not seeking to interfere with the collection of state taxes from the party that owes the tax. Access to the federal courts protects out-of-state businesses from parochial favoritism. Statutes or regulations imposed by a state only having a remote connection with state taxes should not be subject to the TIA or the doctrine of comity.

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of *amicus's* intent to file this brief. Written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

STATEMENT OF THE CASE

In February 2010, the Colorado legislature enacted notice and reporting obligations on remote sellers who are not collecting Colorado's sales or use tax, *see* Colo. Rev. State. § 39-21-112(3.5)(c) & (d). The Colorado Department of Revenue ("CDOR") promulgated a regulation in June 2010 to fill in some gaps in the law. *See* Colo. Code Regs. § 201-1:39-21-112.3.5 (2010). The law and the regulation require sellers who have no obligation to collect or remit Colorado's sales tax or use tax to: (1) provide a notice to the purchaser at the time of sale that the seller does not collect Colorado's tax and that the purchase is not exempt merely because it is purchased over the Internet or by other remote means (including a prohibition of the seller implying no tax is due); (2) annually send to purchasers, via first class mail, detailed information on their purchases shipped to a location in Colorado; and (3) annually provide the CDOR with a seller's report that lists the names of the purchasers shipping goods into the State along with those purchasers' billing addresses, shipping addresses, and the total amount sold to each purchaser. Finally, penalties can be imposed on remote sellers who fail to comply with the notice and reporting rules. § 201-1:39-21-112.3.5-3-a(iv) (2010).

The Petitioner, Direct Marketing Association ("DMA"), a trade organization supporting remote sellers with a multitude of marketing channels (*e.g.*, catalog, advertisements, and the Internet), filed suit against Colorado's law and regulation in June 2010 in the federal District Court for the District of Colorado

("District Court"). The thrust of DMA's complaint was Colorado's law and regulation violated the Commerce Clause. There was no objection to the remote sellers' collection or remittance responsibilities to the State.[2] In January 2011, the District Court granted a preliminary injunction, enjoining the CDOR from enforcing the law and regulation, made permanent in the District Court's March 30, 2012 decision. *Direct Marketing Association v. Huber*, Civil No. 10-cv-015460-REB-CBS, 2012 WL 1079175 (D. Colo. Mar. 30, 2012) (hereinafter "D. Colo. Op.").

The CDOR subsequently appealed that decision to the United States Court of Appeals, Tenth Circuit ("Tenth Circuit"). While DMA and the CDOR never raised the TIA to have the case dismissed on jurisdictional grounds before the District Court or the Tenth Circuit, on August 23, 2013, the Tenth Circuit held the TIA divested the District Court of its jurisdiction and remanded the case back to the District Court to dismiss the case for lack of jurisdiction. *Direct Marketing Ass'n v. Brohl*, 735 F.3d 904 (2013) (hereinafter "10th Cir. Op."). DMA filed a request for rehearing *en banc*, which was denied on October 1, 2013. Proceeding to state court on November 5, 2013, DMA requested an injunction of Colorado's law and regulations from enforcement. On February 18, 2014, a state court granted DMA's request for a preliminary injunction. The state court found the law and regulation only fell on sellers located outside of Colorado and thereby facially discriminated against interstate commerce. *Direct Marketing Ass'n v. Colorado Dep't of*

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[2] The DMA also alleged constitutional issues under the First Amendment, the right of privacy of Colorado consumers, and the Takings Clause, but those issues are outside the scope of this appeal. Pet'r's Br. 12.

Revenue, No. 13CV34855 (Denver Dist. Ct. Feb. 18, 2014). On July 10, 2014, the state court stayed further proceedings pending resolution of this appeal. Pet'r's Br. 15.

SUMMARY OF THE ARGUMENT

This case provides the Court with an opportunity to clarify the limits of the TIA's jurisdictional bar to federal courts in lawsuits not directly challenging state tax administration or state tax collection.

The TIA provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." 28 U.S.C. § 1341. The sole issue in determining the applicability of the TIA in this case is whether the petitioner's challenge to novel, burdensome, and discriminatory information reporting rules that do not themselves impose a tax or the obligation to collect a tax can somehow be construed as "restrain[ing] the collection of any tax under State law." *Id.*

The Tenth Circuit on its own accord, in an unprecedented, broad ruling, held the TIA bars federal court jurisdiction over a lawsuit by non-taxpayers to enjoin informational notice and reporting requirements of a state law that neither impose a tax nor require the collection of a tax. In so holding, the Tenth Circuit placed itself in direct conflict with *Hibbs v. Winn*, 542 U.S. 88 (2004), and multiple long-standing holdings in federal circuit courts, which limit the scope of the TIA to lawsuits brought by taxpayers relating to the assessment or collection of their own state taxes: the First Circuit in *United Parcel Service, Inc. v. Flores-Galarza*, 318 F. 3d 323 (1st Cir. 2003); the Second Circuit in *Wells v. Malloy*, 510 F. 2d 74 (2d Cir. 1975); and the Sixth Circuit in *BellSouth*

Telecommunications, Inc. v. Farris, 542 F.3d 499 (6th Cir. 2008).

The goal of the TIA is to protect state revenues by preventing *taxpayers* from challenging state tax assessments or seeking state refunds outside the normal state administrative and judicial channels. The TIA was not designed to prohibit federal court jurisdiction over all aspects of state tax administration. *Hibbs* at 104-105. The Tenth Circuit's opinion provides no workable standard because it bars federal court jurisdiction in any state action that somehow affects state revenue. The more appropriate test to determine if the TIA applies is the two-part test set out in *Hibbs*: the TIA should *not* apply when a plaintiff: 1) does *not* contest its own tax liability, or 2) does *not* seek to interfere with a state's collection of tax revenues from the party that owes the tax.

The principles of comity, as espoused by this Court in *Levin*, also do not apply here. The comity doctrine in the tax context stems from the deference shown to states in matters of tax policy. *Levin*, 560 U.S. at 414 ("[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification" (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)). Such deference is not warranted here, in part, because the CDOR waived application of the comity doctrine by failing to raise it in lower courts. Further, *amicus* believes that even if comity is not deemed to be waived, comity is irrelevant in this case and should not be applied. Allowing federal court jurisdiction in this case does not implicate the concern of impeding the administration of state taxation. *See id.* at 417 (the "comity doctrine restrains federal courts from entertaining claims for relief that risk disrupting state tax administration").

The application of the TIA has been limited to cases directly addressing state and local taxes. Other federal courts have correctly held it does not bar a person from challenging a state or local fee in federal court; therefore, it would be incongruous to hold it should apply to a state's regulation that does not derive any tax revenue from the person subject to the regulation. Neither situation restrains the collection of a state or local tax.

In today's world, nearly every aspect of economic life is related to some state tax; it is not hard to invent a colorable connection between an activity and its potential impact on a state government's *fisc*. However, testing the reach of the TIA by such imaginative extrapolation would bar the doors to the federal courts in ways the drafters of the TIA never intended. Interpreting the TIA to operate on speculation, as the Tenth Circuit has done here, turns ordinary federal court jurisdiction into the exception and not the rule.

The federal courts should be available to adjudicate federal constitutional challenges to regulations not directly related to a state imposing a tax on a person. The Tenth Circuit seriously erred by breaking away from TIA precedent—its decision should be reversed.

ARGUMENT

I. THE TAX INJUNCTION ACT IS INAPPLICABLE IN ACTIONS NOT CONTESTING TAX LIABILITY OR SEEKING TO INTERFERE WITH THE COLLECTION OF STATE TAXES.

Amicus believes this Court should follow the reasoning of its prior decision in *Hibbs v. Winn*, 542

U.S. 88 (2004), and in multiple holdings in federal circuit courts, to limit the scope of the TIA to lawsuits brought by taxpayers related to the assessment or collection of state taxes. It should not bar lawsuits that do not contest tax liability or seek to interfere with the collection of state taxes. *See United Parcel Service, Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003); *Wells v. Malloy*, 510 F.2d 74 (2nd Cir. 1975); and *BellSouth Telecommunications, Inc. v. Farris*, 542 F.3d 499 (6th Cir. 2008).

The Tenth Circuit in this case held that the TIA bars federal court jurisdiction over a lawsuit by non-taxpayers to enjoin informational notice and reporting requirements of a state law that neither imposes a tax nor requires the collection of a tax. This decision directly conflicts with this Court's opinion in *Hibbs* and in the decisions in other circuits that take a more reasonable view of the jurisdictional bar created by the TIA. A review of the facts and legal analysis in *Hibbs* and in these circuit court decisions illuminates the great divide between the test set forth in these cases and the standard used by the Tenth Circuit in the instant case.

In *Hibbs*, this Court ruled the TIA did not bar federal court jurisdiction over a challenge brought by plaintiffs on Establishment Clause grounds against an Arizona law authorizing tax credits for contributions to organizations that award educational scholarships and tuition grants to children attending private schools. In making its decision in *Hibbs*, this Court focused on two key determinant factors also present in this case; the TIA does not apply if: 1) the plaintiff is not contesting its own tax liability and 2) the plaintiff does not seek to interfere with the state's collection of tax revenues from the party that owes the tax. As this Court noted:

> The question presented is whether the Tax Injunction Act which prohibits a lower federal court from restraining 'the assessment, levy or collection of any tax under State law, 'bars the suit. Plaintiffs-respondents do not contest their own tax liability. Nor do they seek to impede Arizona's receipt of tax revenues. Their suit, we hold, is not the kind § 1341 proscribes'.[3]

Id. at 93.

This Court's decision in *Hibbs* was rooted in its analysis of the legislative history of the TIA. The key goal of the TIA was to protect state revenues by preventing taxpayers from challenging state tax assessments or seeking state tax refunds outside the normal state administrative and judicial channels. In reviewing the legislative history of the TIA, this Court noted:

> [I]n enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority. Nowhere does the

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[3] In *Hibbs*, this Court also noted another purpose of the TIA was to "eliminate disparities between taxpayers who could seek injunctive relief in federal court—usually out-of-state corporations asserting diversity jurisdiction—and taxpayers with recourse only to state courts, which generally require taxpayers to pay first and litigate later." *Hibbs* at 104. However, this factor is not present in the instant case because Colorado's notice and reporting requirements are only imposed on out-of-state corporations with no filing responsibilities in Colorado.

> legislative history announce a sweeping congressional direction to prevent federal-court interference with all aspects of state tax administration.

Id. at 104-105 (internal quotations omitted).

To be sure, the *Hibbs* case dealt with a constitutional challenge to an Arizona tax credit provision, and this Court noted a decision in favor of the plaintiffs would actually *increase* tax revenues, not *decrease* tax revenues. Nonetheless, this Court's analysis in the case was not limited to situations involving tax credits as indicated by its favorable reference to Judge Friendly's decision in *Wells v. Malloy* (a case that did not involve tax benefits or credits). This Court quoted his analysis of the intent of the TIA: "Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law going to the validity of the particular taxes *imposed upon them* . ." *Hibbs* at 109, citing *Wells* at 77 (italics added).

Cases in three other circuits—two of which were decided before this Court handed down its decision in *Hibbs*—have all adopted similar approaches to delineate federal court jurisdiction in light of the TIA. In the *UPS* case, the First Circuit ruled the Butler Act, the Puerto Rico law analogous to the federal TIA, did not bar federal court jurisdiction over a challenge to a tax administration statute that imposed burdensome regulatory requirements on third parties. *UPS* at 330-32. The *UPS* case involved a Puerto Rico excise tax on items imported into Puerto Rico. *Id.* at 326. While the incidence of the excise tax in Puerto Rico fell on the recipients/consumers of the imported goods—as does the use tax in Colorado—the Commonwealth's statutory scheme prohibited interstate carriers from making deliveries into Puerto Rico unless the carrier: (1) obtained up-front proof of the recipient's payment of the territorial excise tax, or (2) complied with complex rules that called for a prepayment of the tax along with provision to the government of extensive daily documentation on shipments. *Id.* at 325.

The similarities between the *UPS* case and this case are striking. In both situations, the government endeavored to enhance the collection of taxes by imposing significant regulatory burdens on third parties that both parties agreed were not subject to the tax at issue. In both cases, the third parties did not contest the underlying tax liability of the consumers or the authority of the government to collect it. Rather, the third parties protested territorial and state tax schemes that imposed significant regulatory burdens on them with the threat of sanctions or penalties for not following the suspect law.

Unlike the Tenth Circuit in this case, the First Circuit in *UPS* held that not all State measures to collect a tax, however tangential, were immune from federal jurisdiction. *Id.* at 331. In holding the Butler Act did not bar federal jurisdiction over UPS's constitutional challenge to Puerto Rico's statutory scheme, the First Circuit stated, "Not every statutory or regulatory obligation that may aid the Secretary's ability to collect a tax is immune from attack in federal court by virtue of the Butler Act's jurisdictional bar. Such an interpretation extends the concept of tax collection and therefore the breadth of the Butler Act, too far." *Id.*

In the *Wells* case, the Second Circuit similarly held the TIA did not bar federal court jurisdiction over a taxpayer challenge to a law with no direct impact on a state's tax collection efforts, but rather an indirect deployment of its coercive powers to achieve its goals. *Wells* at 77.

The *Wells* case involved a challenge to a Vermont statute allowing the suspension of a person's driver's license if a motor vehicle excise tax was not paid. *Id.* In that case, the plaintiff did not dispute the tax was owed; rather, the plaintiff argued that the State's coercive method of penalizing someone who failed to pay the tax violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 76.

The *Wells* case, unlike the *UPS* case and the instant case, did not involve regulatory requirements placed on a third party. In *Wells*, the federal lawsuit challenged the penalty imposed on the taxpayer for noncompliance. However, it did share in common with the First and Tenth Circuit cases a challenge to a state law that is entirely tangential to the traditional mechanisms for state tax collection.

Unlike the Tenth Circuit's decision in this case, the Second Circuit in *Wells* drew a distinction between lawsuits in which a taxpayer sought directly to "restrain" the collection of a tax, and those where the taxpayer challenged some other aspect of state tax administration. *Id.* at 77. The Second Circuit held the focus of the TIA was on barring lawsuits in federal court that directly interfered with the collection of state monies, "rather than indirectly through a more general use of coercive power. Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law going to the validity of the particular taxes imposed upon them[.]" *Id.*

Closely akin to this case, in *BellSouth*, the Sixth Circuit held the TIA did not bar a lawsuit by telecommunications providers challenging Kentucky's statute that prohibited the providers from separately stating a gross receipts tax on invoices provided to their customers. *Bellsouth*, 542 F.3d at 501-04. Similar to DMA challenging Colorado's notice and reporting regulation, the telecommunications providers in *BellSouth* challenged neither the gross receipts tax nor the state's ability to collect it; rather, they challenged the federal constitutionality of the State's regulatory authority to prohibit the providers from informing their customers their bills were going up to reflect the new tax.[4] *Id.* at 500.

The Sixth Circuit listed several reasons why the TIA did not apply, including the following reasons pertinent to the present case: 1) the taxpayers were not trying to avoid paying the tax, and 2) the relief sought "would not interfere with the relationship between the body that imposed the tax (the Commonwealth) and the bodies that owe the tax (the providers)." *Id.* at 502. The court rejected the argument by the State that the providers sought to interfere with the collection of taxes. "A ban on enjoining a *State's* tax-collection efforts do not apply." *Id.* (Italics in original). Following the lead of the First and Second Circuits in distinguishing the application of the TIA to a tax agency's administrative functions versus a tax agency's tax collection functions, the Sixth Circuit expediently ruled on the First Amendment issue.

In the instant case, the State cites several federal circuit court decisions to support its argument that the

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[4] The telecommunication providers challenged the regulation's prohibition against notifying their customers of the tax under the Free Speech Clause of the First Amendment.

TIA should apply in this case because it bars "suits challenging a State's chosen method for collecting owed taxes." Resp't's Br. in Opp'n 20-22. However, all of the cases cited by the State were brought by taxpayers contesting their own taxes or seeking to interfere with collection from taxpayers who do owe tax. *Id.*, citing *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722 (7th Cir. 2011) (taxpayer casinos sought constructive trust for their own assessments paid to support racetracks under the Illinois Racing Acts); *Blangeres v. Burlington N., Inc.*, 872 F.2d 327 (9th Cir. 1989) (taxpayers sued to enjoin railroad from disclosing earning records and other tax-related information to state taxing authorities); *Gass v. County of Allegheny*, 371 F.3d 134 (3d Cir. 2004) (taxpayers argued due process violations in the appeals process of property taxation); *Amos v. Glynn Cnty. Bd. of Tax Assessors*, 347 F.3d 1249 (11th Cir. 2003) (taxpayer property owners sued to enjoin allegedly unconstitutional spot reappraisals of their *own* property). The CDOR's authorities stand for the unremarkable proposition that the TIA bars actions where taxpayers contest their *own* taxes. These authorities are: (1) irrelevant to the case at bar, and (2) do not conflict with *UPS*, *Malloy*, or *BellSouth*.

Because DMA is not contesting any of Colorado's taxes, the TIA does not apply under *Hibbs*, *UPS*, *Wells*, and *BellSouth*. Moreover, the TIA does not bar federal review here because nothing in this suit is stopping Colorado from auditing, assessing, and collecting its use tax directly from Colorado purchasers.

II. THE COMITY DOCTRINE IS NOT APPLICABLE TO THIS CASE

Having addressed why the TIA is not a bar to federal jurisdiction in this case, we now turn to address why the comity doctrine also has no place in this case. The first part of this analysis focuses on a critical difference between the TIA and the comity doctrine—only the latter can be waived. As noted by the Tenth Circuit in this case, "[The TIA] serves as a broad jurisdictional barrier that limits drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *See* 10th Cir. Op. at 910, citing *Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 825-26 (1997) (internal quotations omitted). This jurisdictional bar applies even if the parties to the case do not dispute a federal district court's jurisdiction in a case. 10th Cir. Op. at 910, quoting from *Folio v. City of Clarksbrug*, 134 F.3d 1211, 1214 (4th Cir. 1998).[5]

While this Court crystalized in *Levin v. Commerce Energy*, 560 U.S. 413 (2010), that the comity doctrine still applies in certain situations as an exercise of judicial restraint "to abstain from deciding the remedial effects of [the state tax measure] holding," *id.* at 427-28, that doctrine is not applicable to this case. It is not applicable because it was: (1) waived by CDOR by its failure to raise the issue in the lower courts, and (2) even if was not waived, the use of the comity doctrine is not appropriate in this case.

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[5] "This statutory provision is a jurisdictional bar that is not subject to waiver, and the federal courts are duty-bound to investigate the application of the [TIA] regardless of whether the parties raise it as an issue." *Id.* at 1214.

A. Comity Has Been Waived in This Case

The CDOR acknowledges it "did not challenge the federal district court's jurisdiction on TIA grounds and, instead, agreed to seek an expedited ruling on the merits of the Commerce Clause challenge." *See* Resp't's Br. in Opp'n n.1. The CDOR, however, now suggests it can raise the comity doctrine as an issue to defend the Court of Appeals' decision that the TIA applied to this case. *See* Resp't's Br. in Opp'n, nn.1 and 7. To highlight this position, the CDOR cites *United States v. N.Y. Tel. Co.*, 434 U.S. 159 (1977), for the proposition that this Court possesses discretion to consider comity "because the prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted." *Id.* at 166, n.8.

N.Y. Tel. Co. is easily distinguishable from the case at hand. In that case, the underlying concern of whether certain legal arguments were considered by both the district court and the circuit court was determined not to be an issue. The *N.Y. Tel. Co.* Court noted the arguments were presented to the lower courts. *Id.* In contrast, the CDOR did not raise (or brief) a jurisdictional issue to the lower courts; the CDOR never raised the TIA or the comity doctrine as a jurisdictional bar to the federal District Court or the Tenth Circuit. By not properly raising the issue, the CDOR waived its ability to subsequently raise the comity doctrine in this case.

In a concurring opinion in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 119-122 (1981), Justice Brennan succinctly noted the comity doctrine should only be used in special circumstances:

> While the 'principle of comity' may be a source of judicial policy, it is emphatically no source of judicial *power* to renounce jurisdiction. The application of the comity principle has thus been limited to a relatively narrow class of cases: *Only where a federal court is asked to employ its historic powers as a court of equity, and is called upon to decide whether to exercise the broadest and potentially most intrusive form of judicial authority, does 'comity' have an established and substantial role in informing the exercise of the court's discretion*. Surely no judicial power to fashion novel doctrine concerning the jurisdiction of the federal courts is to be found in the Constitution itself, which provides that the judicial power shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish.

Id. at 119-122 (Brennan, J., concurring) (citing U.S. Const., Art. III, § 1) (italics added). And, importantly, this Court recently supported that notion in *Levin*. With *New York Tel. Co.* set aside, *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471 (1977), remains as the authority on when comity is waived. *Hodory* says that in a case like this one comity is waived. The State appears to concede as much by saying nothing about *Hodory* and, instead, focusing on *New York Tel. Co.*, which as previously established, is inapposite.

The *Levin* Court also negated the Sixth Circuit's concern with the comity doctrine making the TIA "*effectively superfluous*." *Levin* at 433 (italics added). The Court noted that "if a state voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system." *Levin* at 432, citing *Hodory* at 480. The CDOR, admitting it sought an "expedited ruling" and not challenging the federal District Court's jurisdiction, leaves no doubt it waived its ability to assert the comity doctrine. Based on this, the only analysis this Court needs to make is under the jurisdictional bar Congress has placed on the federal courts, the TIA, and not an equitable abstention doctrine—the comity doctrine.

B. Even if the Comity Doctrine Is Not Waived, It Is Inapplicable in This Case.

Even if the comity doctrine is not deemed to be waived, that doctrine is not applicable to this case. DMA did *not* in any way seek to restrain Colorado from collecting tax from any remote seller having a collection responsibility (*e.g.*, those with substantial nexus with the state under *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)). Nor did DMA seek any tax relief, or tangentially challenge another person's exemption from Colorado's sales/use tax that would otherwise frustrate the collection of state taxes. Rather, DMA only seeks relief from the regulatory powers (or police powers) the Colorado Legislature granted the CDOR to impose onerous notification and reporting requirements on remote sellers that have no tax liability or collection responsibility in Colorado. DMA simply asserts the Colorado notice and reporting regulation imposed on remote sellers violates the U.S. Constitution's Commerce Clause. It does not in any manner challenge Colorado's imposition of its sales/use tax on sellers located outside of the state (or on consumers located in the state). Colorado's tax system on remote sellers and in-state users remains intact regardless of whether a federal court strikes down Colorado's notice and reporting scheme.

The factors that would otherwise justify the application of comity are not present here. Comity is not appropriate because this case does not implicate the concern that federal jurisdiction would disrupt operations of the state by impeding the administration of state taxation. *See Perez v. Ledesma*, 401 U.S. 82, 127-28 n.17 (1971) (the "comity doctrine restrains federal courts from entertaining claims for relief that risk disrupting state tax administration"). Nothing about this case will prohibit Colorado from auditing, assessing, or collecting any tax from anyone. To boot, nothing about this case will "derange the operations of government." *Dows v. Chi.*, 78 U.S. 108, 110 (1871). Certainly, this case does not threaten any pre-existing state revenue by asking for its return.

Futhermore, this case does *not* have the "remedy" issue frequently cited to justify the application of the comity doctrine. *Levin* at 427. As noted by this Court in *Levin*, one reason for restricting access to the federal courts in state cases is the remedy a state may need to provide to correct constitutional infirmities is something the state will still ultimately need to address. *Id.* at 431. In *Levin*, while the petitioner was not asking to lower its own tax burden, it was asking for its competitor's tax burdens to increase—affecting state tax administration. The Court applied the principles of comity because it believed the remedy for this sort of request was best left to Ohio's courts and legislature. However, this case does not present that concern because the remedy here is within the power of the federal courts to grant.

This case also differs from *Fair Assessment*, where this Court applied the comity doctrine to prevent a

42 U.S.C § 1983 action seeking damages for the alleged unconstitutional administration of Missouri's property tax. 454 U.S. at 102. Unlike *Fair Assessment*, DMA is not asserting any damages against Colorado for its regulation that violates DMA members' constitutional rights. DMA is also not asserting the state tax laws in Colorado, specifically Colorado's sales/use taxes, are unconstitutional as the Petitioner was attempting to do in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943).

Of note, the challenge to an income tax credit this Court allowed to proceed in a federal district court in the *Hibbs* decision had a greater potential to impact Arizona's administration of its income tax than the action against Colorado's notice and reporting requirements in this case. In *Hibbs*, if the tax credit was declared to violate the Establishment Clause, the State would have had to provide a remedy to redress an unconstitutional tax credit that aided parochial schools. *Hibbs* at 99. However, none of those concerns exists in this case—if DMA is successful, the CDOR is only prohibited from requiring sellers not subject to Colorado's taxing authority to comply with discriminatory notice and reporting regulations. In harmonizing *Hibbs* and *Levin*, this Court should use the following test to limit the applicability of the comity doctrine: it only applies to situations where a taxpayer is not directly challenging its own tax, but is challenging a competitor's exemption to the tax. In *Hibbs*, the plaintiffs were not seeking a competitive tax advantage over another person in raising an Establishment Clause issue. In contrast, in *Levin*, the plaintiff was attacking a tax exemption its competitors enjoyed from Ohio's sales/use tax. This situation does not exist in this case.

This particular case raises a question of interstate commerce, a federal concern properly within the orbit of the federal courts. Based on the above, this Court should refuse to allow the CDOR to assert, in any manner, that the comity doctrine applies to this case.

III. APPLICATION OF THE TAX INJUNCTION ACT SHOULD BE LIMITED AND NOT EXPANSIVE.

A. The TIA Does Not Apply to Fees, So it Would Be Incongruous for the TIA to Apply to Notice and Reporting Regulations

It is long-standing practice the TIA does not bar a person from challenging a state fee in a federal district court. *See i.e.*, *America's Health Ins. Plans v. Hudgens*, 742 F.3d 1319 (11th Cir. 2014); *Hedgepeth v. Tennessee*, 215 F.3d 608 (6th Cir. 2000); *Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 930 (9th Cir.1996), *Hager v. City of W. Peoria*, 84 F.3d 865, 870 (7th Cir.1996); *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 713 (2d Cir.1994); and *San Juan Cellular Tel. Co. v. Public Serv. Comm'n*, 967 F.2d 683 (1st Cir.1992). "The question is whether, for purposes of the TIA, [the] surcharge is a tax (which would defeat the exercise of federal jurisdiction) or a fee (which would allow the exercise of federal jurisdiction)." *Cumberland Farms, Inc. v. Tax Assessor*, 116 F.3d 943, 946 (1st Cir. 1997) (parentheses in original). Thus, it is incongruous for the TIA to bar suits seeking to enjoin notice and reporting requirements while not barring suits seeking to enjoin regulatory fees—both situations akin to each other—as neither situation restrains the assessment or collection of a state tax.

The state courts in Colorado and California, both with restrictions on the imposition of taxes and not fees, have also come to similar conclusions on what constitutes a tax versus a fee. *See TABOR Foundation v. Colorado Bridge Enterprise*, No. 13CA1621, 2014 WL 3955600 (Colo. App. Aug. 14, 2014) (registration fee was not a tax levy prohibited by Colorado's Taxpayer Bill of Rights (TABOR)); and *California Chamber of Commerce v. California Air Resources Board*, No. 34-2012-8000313 (Cal. Super. Ct. Aug. 28, 2013) (regulatory fees are not taxes subject to a supermajority vote of California's legislature), http://elr.info/store/download/81919/8079.

The function of Colorado's notice and reporting obligations is not to impose a general tax, but is more similar to a state fee. Colorado is only attempting to impose its regulatory powers on remote sellers not required to collect and remit Colorado's sales/use tax (albeit in a discriminatory manner). There is no tax imposed, and the penalty is an enforcement tool to encourage non-collecting remote retailers to comply with the State's notice and reporting obligations.[6] There is insufficient revenue to constitute a tax under the *Collins Holding Corp.* test.[7] Clearly, the notice and reporting requirements directly generate no revenue flow; if the non-collecting remote retailers submit the information to the CDOR, the CDOR receives no more and no less tax revenue from such sellers. The Tenth Circuit recognized this when it stated "Even if DMA's constitutional attack on the notice and reporting obligations were successful, Colorado consumers would still owe use taxes by law." 10th Cir. Op. at 918. The requirements simply serve to "aid the [CDOR]'s auditing of [other persons]," defraying the costs of CDOR's cost of regulation. *Id.* Colorado's notice and reporting requirements are only imposed on a narrow group of sellers not physically present in Colorado. It does not apply to the general public, and thus, similar to a fee, the TIA should not bar federal jurisdiction in this case.[8]

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[6] Colo. Rev. Stat. §§ 39-21-112(3.5)(c)(II), (d)(III); 1 Colo. Code Regs. §§ 201-1:39-21-112.3.5(2)(f) ($5 penalty per Colorado sale as to which the Transactional Notice is not given, subject to $50,000 first year cap), (3)(d) ($10 penalty per Annual Summary not mailed, subject to $100,000 first-year cap), (4)(f) ($10 penalty per name not included on a Customer Information Report, subject to a $100,000 first-year cap).

[7] To determine when the TIA applies to a case concerning a tax as opposed to when it does not apply to a case concerning a fee, the courts focus on the "general distinction between broader-based taxes that sustain the essential flow of revenue to state (or local) government and fees that are connected to some regulatory

DMA does not contest Colorado's right to require retailers to collect sales and use tax, or ultimate consumers to pay it, and the requirements do nothing to raise revenue from remote sellers not legally obligated to collect Colorado's sales or use taxes. The

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scheme." *Collins Holding Corp. v. Jasper County*, 123 F.3d 797, 800 (4th Cir. 1997).

[8] "The mere fact that the . . . section is contained in a tax law of the State should not lead to automatic sanctuary under [the TIA]." *Mobil Oil Corp. v. Tully*, 639 F.2d 912, 918 (1981). In *Mobil Oil*, plaintiff oil companies challenged the constitutionality of an anti-passthrough provision of a 2% gross receipts tax for oil companies doing business in New York. *Id.* at 913. The state moved to dismiss the case under the TIA. *Id.* at 914. In finding the TIA did not preclude federal jurisdiction, the Second Circuit stated, "No one questions the right of the State of New York to place the legal incidence of the tax upon oil companies but it is an entirely different matter for the legislature to instruct the person taxed that he cannot raise the resources to pay the tax by increasing the price of his product." *Id.* at 918.

requirements fall outside the state's taxing power, and as Colorado is asserting its police power as opposed to its taxing power, the TIA should not stop DMA from obtaining federal court jurisdiction. *Mobil Oil* at 918 ("We agree that the State has the right to place the legal incidence of the tax upon the oil companies; it has selected its target. But in barring the targets of the tax from recovering their costs the State has gone beyond its taxing powers and has employed its police powers").

In finding the TIA applies to this challenge of the notice and reporting requirements, the Tenth Circuit tries to distinguish the case at bar from *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (2013). In *Hobby Lobby*, the Tenth Circuit analyzed the application of the Anti-Injunction Act ("AIA") to a case challenging the federal government's authority to impose a penalty on any employer that did not provide contraceptive coverage as required by the Patient Protection and Affordable Care Act. *Id.* at 1126-28. The AIA is the federal counterpart of the TIA and states "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax is assessed." 26 U.S.C. § 7421(a). The Tenth Circuit found the AIA did not apply when plaintiffs "are not seeking to enjoin the collection of taxes," but "are seeking to enjoin the enforcement, by whatever method" of a regulation. *Hobby Lobby* at 1127.

The distinction the Tenth Circuit tries to make between *Hobby Lobby* and this case cannot stand. In both cases, the plaintiffs did not challenge the taxing authority or taxes imposed by the tax agency; in *Hobby Lobby*, the challenge was against contraceptive requirements. "Here, DMA challenges notice and reporting requirements in Colorado's sales and use tax statutory scheme." 10th Cir. Op. at 917. In both cases, the plaintiffs faced penalties if they did not comply with regulations they believed unconstitutional. In both cases, the regulations did not serve any revenue-raising function. If the AIA did not apply in *Hobby Lobby* because "the AIA does not apply to 'the exaction of a purely regulatory tax,'" then it should not apply in this case involving a regulation.[9] *Hobby Lobby* at 1128, citing *Robertson v. United States*, 582 F.2d 1126, 1127 (7th Cir. 1978).

B. Federal Oversight Remains Important

The CDOR's admonition of *amicus* for its views regarding the propriety of federal court jurisdiction in a case like this illustrates precisely why this Court should narrowly interpret the TIA and comity. The CDOR states "This Court has consistently rejected the argument by amicus [COST] that state courts are somehow less equipped to hear constitutional challenges." Resp't's Br. in Opp'n n. 4. Although, *amicus* does not say, or even imply, such a thing anywhere in its previous briefing before the Court, it is revealing the CDOR interprets *amicus*'s view on the propriety of federal court jurisdiction this way.

The CDOR's admonition dismisses *amicus*'s concerns about the TIA and comity by reframing those concerns as a question of whether state courts are equipped to handle constitutional challenges. Therefore, it follows, that if state courts are capable of hearing constitutional challenges, *amicus*'s concerns should end there.

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[9] When *Hobby Lobby* reached the U.S. Supreme Court, this Court did not address the application of the AIA because the parties agreed the AIA should not bar Art. III standing. Pet. for a Writ. of Cert. 18a, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

When *amicus* contends federal courts should protect federal interests, *amicus* is not casting aspersions on the powers or roles of state courts. All *amicus* is saying is questions of federal law should be entertained by federal courts whenever and to the fullest extent possible because that is why we have federal courts. The CDOR's defensive response to the prospect of answering to a federal court for the State's transgressions of federal constitutional law fails to acknowledge the federal courts were created to protect federal rights. This is so regardless of whether a state court may offer relief:

> Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. *Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, '. to guard, enforce, and protect every right granted or secured by the Constitution of the United States .* '

Zwickler v. Koota, 389 U.S. 241, 248 (1967) (internal citations omitted) (emphasis added).

Apparently, the CDOR believes federalism and comity are protections meant for the State alone. However, this Court has plainly stated otherwise:

> The limitations that federalism entails are not therefore a matter of rights belonging

> only to the States. States are not the sole intended beneficiaries of federalism. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.

Bond v. United States, 131 S. Ct. 2355, 2364 (2011).

This case is a good example of why the federal courts should be circumspect in applying the TIA and comity. Here, there is a grave concern Colorado is exceeding federal restraints on its power by conscripting out-of-state entities to do the State's bidding under the color of raising state revenue. Such targeted financial strikes profoundly troubled the Fourth Circuit in another TIA case:

> We cannot overlook the fact that the absence of federal jurisdiction in this case would turn what are truly interstate issues over to local authorities. Applying the Tax Injunction Act might encourage punitive financial strikes against single entities with national connections, for the federal courts would be unavailable to protect companies against local discrimination, preempted state laws, and other federal constitutional violations. The implications of allowing localities to impose financial exactions exclusively upon single entities of national reach with no accountability in federal court are profound, and we decline to foreclose these federal claims with a jurisdictional bar.

GenOn Mid-Atlantic, LLC v. Montgomery County, 650 F.3d 1021, 1026 (4th Cir. 2011).[10]

Amicus's concurrence with the views expressed by both the Fourth Circuit in *GenOn* and the Tenth Circuit in *Kerr* only reflects *amicus*'s concern the TIA and the comity doctrine will increasingly be used to keep cases best suited to federal courts away from them. The Tenth Circuit's decision in this case, if left as expansive, unmoored, and unworkable as it currently stands, would convert the TIA and the comity doctrine into a blindfold keeping cases that should be in federal courts away from them.

Since nearly the time of the founding of our nation, this Court has been mindful of the proposition:

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Bank of United States v. Deveaux, 9 U.S. 61, 87 (1809).

In reversing the Tenth Circuit's decision, this Court will recognize the proper role of the federal courts and place meaningful limits on the TIA and the doctrine of comity.

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[10] The Fourth Circuit is not alone in this view. Ironically, the 10th Circuit followed this line of reasoning in its decision *Kerr v. Hickenlooper*, 880 F. Supp. 2d 1112 (D. Colo. 2012), *aff'd* 744 F.3d 1156 (10th Cir. 2014), *reh'g en banc den.* 2014 U.S. App. LEXIS 14170 (10th Cir. July 22, 2014).

CONCLUSION

In the years since its passage, the TIA has become unmoored from its original purposes and now threatens to turn federal court jurisdiction on its head. The Tenth Circuit's decision in this case, if left to stand, allows any state action conflicting with federal prohibitions that can imaginably have an effect on state revenues to escape the watchful eye of the federal courts.

The TIA is not a blindfold for the states to use to hide unconstitutional acts made in the name of state taxes from the federal courts. This Court should return the TIA and comity to their original, limited purposes.

For the reasons set forth above, COST urges this Court to follow long-standing TIA precedent by reversing the decision of the Tenth Circuit.

Respectfully submitted,

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September 16, 2014

AMICUS
CURIAE
BRIEF

No. 13-1032

In the
Supreme Court of the United States

DIRECT MARKETING ASSOCIATION,
PETITIONER,

v.

BARBARA BROHL, EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF REVENUE,
RESPONDENT.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF FOR THE STATES OF ILLINOIS, ALASKA, ARIZONA, HAWAII, IDAHO, INDIANA, IOWA, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH DAKOTA, OREGON, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, AND WYOMING AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

The Tax Injunction Act, 28 U.S.C. § 1341 (TIA), provides: "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Petitioner Direct Marketing Association's (DMA) members include Internet retailers who, under Colorado's Act Concerning the Collection of Sales and Use Taxes on Sales Made by Out-of-State Retailers (the Collection Act), have the choice of either (1) remitting sales and use taxes on their sales to Colorado consumers, or (2) providing their customers, and the State, with information that allows accurate assessment and payment of those taxes. DMA filed this federal suit challenging the State's authority to require Internet retailers to make that choice. The question presented is:

> Whether the TIA bars the federal district courts from enjoining Colorado's efforts to assess and collect the taxes it is owed through the Collection Act and whether principles of comity likewise warranted dismissal of DMA's lawsuit.

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INTEREST OF THE *AMICI CURIAE*

The 24 *amici* States and the District of Columbia submit this brief in support of Respondent Barbara Brohl, Executive Director, Colorado Department of Revenue, to urge affirmance of the judgment of the United States Court of Appeals for the Tenth Circuit that the TIA barred federal district court jurisdiction over DMA's action challenging Colorado's Collection Act. This Court has long recognized the importance of tax collection to the operations of the States, see *Dows v. City of Chicago*, 78 U.S. 108, 109-10 (1870), and the TIA acknowledges the "imperative need of a State to administer its own fiscal operations," *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981) (internal quotation marks omitted). The Tenth Circuit's decision requiring DMA's action to be brought in state court gives effect to the TIA's purposes and history and to the principles of federalism, abstention, and comity that underlie and operate alongside the statute. The decision in this case will affect the scope of the TIA's jurisdictional bar, could also affect the related doctrine of comity, and will undoubtedly impact the well-established state interest in having challenges to state tax laws heard in state court.

STATEMENT

1. DMA is a trade association of businesses and organizations using and supporting multi-channel marketing mechanisms, such as direct mail catalogs, print and broadcast advertisements, and the Internet. Pet. Br. 11. Many DMA members have no store, property, employees, or other physical presence in Colorado and, as such, are not obligated to collect sales and use tax on retail sales to Colorado consumers. *Ibid*.

2. To collect sales and use tax from in-state consumers, Colorado passed the Collection Act, giving non-collecting retailers (who are usually remote, out-of-state retailers, often Internet retailers) the choice between collecting and remitting the sales and use tax or complying with three informational and reporting requirements. Resp. Br. 6. Those three requirements for non-collecting retailers are: (1) notifying purchasers that they may be subject to Colorado use tax; (2) sending Colorado purchasers who buy more than $500 worth of goods from the retailer an annual summary listing dates, general categories, and purchase amounts and reminding the consumers of their obligation to pay use tax; and (3) sending an annual report to the Colorado Department of Revenue listing purchaser names, addresses, and total expenditures. *Id*. at 6-7; COLO. REV. STAT. §§ 39-21-112(3.5)(c)(I), (d)(I)-(II); 1 COLO. CODE REGS. §§ 201-1:39-21-112.3.5(2)-(4).

3. DMA filed this lawsuit in federal district court, claiming that the Collection Act is unconstitutional

under the Commerce Clause, the First Amendment, Colorado consumers' right to privacy, and the Takings Clause. Pet. Br. 12. DMA also sought, and obtained, a preliminary injunction enjoining the operation of the statute on Commerce Clause grounds. Resp. Br. 9. The district court later granted summary judgment to DMA on that basis and permanently enjoined the Collection Act. *Ibid.*

4. On appeal, the Tenth Circuit vacated the injunction and held that the TIA forecloses federal courts from considering DMA's action. Pet. App. A33. In reaching this decision, the court rejected DMA's argument that the TIA applies only to cases brought by taxpayers. Pet. App. A12-A16. Instead, the court held that the statute has broad application and that the TIA bars the action because the statute applies to all actions to restrain or enjoin the collection of state taxes, regardless of the plaintiff's identity. Pet. App. A16-A20. The court also explained that, the TIA aside, "the doctrine of comity also militates in favor of dismissal." Pet. App. 33 n.11.

5. This Court granted certiorari on July 1, 2014.

SUMMARY OF ARGUMENT

A hallmark of federal court jurisdiction is the reluctance of the federal judiciary to intrude upon matters of state tax law. Acknowledging the importance of taxation to States' autonomy and fiscal independence, federal courts have long recognized that States must be permitted to administer their tax systems without undue outside interference. The principles underlying this policy, including federalism, comity, and deference to state courts on matters of state law, were incorporated by Congress in the TIA, and the TIA accordingly should be read broadly to serve those principles. In light of these principles, the Collection Act fits securely within the TIA's jurisdictional bar. The Collection Act enables Colorado to collect use tax from Colorado consumers in situations where Colorado is unable to collect sales tax from remote, out-of-State retailers. The increasing shift of commerce to Internet transactions has amplified that need. The Collection Act is an effort to address this problem, and it forms an integral part of the administration of Colorado's tax system. Enjoining the Collection Act would significantly restrain Colorado's ability to assess and collect use tax legitimately due. Therefore, DMA's action challenging the Collection Act is easily within the TIA's scope and purpose.

The TIA aside, principles of comity require the federal court to decline jurisdiction over DMA's challenge. Comity independently works to protect state tax administration from federal court interference. Application of the comity doctrine is especially apt here where the Collection Act enables Colorado to collect state tax revenue, Colorado courts are better suited than federal courts to fashioning any necessary relief, and the goal of this action is to maintain a competitive advantage for out-of-state retailers from whom sales tax may not be collected over in-state retailers who are subject to the imposition of sales tax. Because DMA seeks to invoke federal judicial authority to prevent the operation of a state law whose purpose is to ascertain and collect taxes, comity should constrain the exercise of federal jurisdiction in this case.

ARGUMENT

I. The TIA Must Be Broadly Construed in Line with Longstanding Precedent Applying the Statute and Consistent with Its History and Purpose, Thus Precluding Federal Jurisdiction over DMA's Challenge.

The TIA precludes federal district courts from exercising jurisdiction over suits that seek to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." 28 U.S.C. § 1341. Respondent easily demonstrates that a plain reading of this language reaches DMA's lawsuit. Resp.Br. at 17-21. Nonetheless, DMA insists on a crabbed reading of the statute, arguing, for example, that the words "enjoin, suspend or restrain" refer only to very specific equitable remedies, Pet. Br. at 22-32, and that the statutory terms "assessment, levy or collection" should be given a narrow interpretation, *id.* at 36-39. But an examination of the TIA's history, principles, and purpose demonstrate that even if the statutory language permitted such a cramped reading, a broad reading is, by far, more appropriate.

Indeed, this Court has already rejected an unnaturally restrictive reading of the statute. In *California v. Grace Brethren Church*, this Court held that the TIA "prohibits a district court from issuing a declaratory judgment holding state tax laws unconstitutional," even though the plain terms of the statute do not reference declaratory judgments. 457

U.S. 393, 408 (1982); see *Marcus v. Kansas Dep't of Revenue*, 170 F.3d 1305, 1309 (10th Cir. 1999).

The Court in *Grace Brethren Church* reached this conclusion by considering the "practical" effect of a declaratory judgment and refusing to read the statute so narrowly as to "defeat[ ] the principal purpose of the" TIA. 457 U.S. at 408. In this case too, it is critical that the Court consider the scope of the TIA against the background of its history and purpose. And the "principal purpose" of the TIA is "'to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes.'" *Id.* at 408-09 (quoting *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981)); see *id.* at 410 n.22 (Congress's concern was to "divest[ ] the federal courts of jurisdiction to interfere with state tax administration"). Thus, the TIA should be read "consistent with the principles of federalism, comity and non-interference with state fiscal affairs embodied in the Act." *Robinson Protective Alarm Co. v. City of Philadelphia*, 581 F.2d 371, 375 (3d Cir. 1978) (citing *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976)).

A. The TIA is grounded in a long history of deference to States in matters related to taxation.

The TIA is rooted in principles that were well-established in federal law long before its enactment in 1937. In the nineteenth century, this Court held that a federal court's equitable powers did not allow it to entertain a suit seeking to enjoin a state tax law on the basis that it was illegal, noting that "[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments" so "it is of the utmost important to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Dows v. City of Chicago,* 78 U.S. 108, 109-10 (1870). *Dows* recognized that interference with state tax collection "may derange the operations of government, and thereby cause serious detriment to the public." *Id.* at 110.

Thus, for decades before the TIA was enacted, this Court exhibited "a proper reluctance to interfere by prevention with the fiscal operations of the state governments" which caused the Court "to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired."* *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 282 (1909). Succinctly, "the illegality or unconstitutionality of a state or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States." *Ibid.*; see *Singer Sewing Mach. Co. of New Jersey v. Benedict*, 229 U.S. 481, 484-85 (1913).

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* The TIA's jurisdictional bar operates only where "a plain, speedy and efficient remedy" is available in state court. 28 U.S.C. § 1341. Because petitioner does not argue that such a remedy is unavailable in the Colorado courts, that aspect of the TIA is not at issue in this case.

This "guiding principle" that federal courts will not exercise the "extraordinary remedies" of injunctive relief when the rights at issue may be protected elsewhere "is of peculiar force in cases where the suit is brought to enjoin the collection of a state tax" in federal court. *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932). *Matthews* explained that the "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it." *Id.* at 525; see *Robinson*, 581 F.2d at 375 (TIA embodies "judicially developed limits on federal equity jurisdiction articulated in" *Matthews*).

When Congress passed the TIA, thereby partially codifying and building upon these principles, it was responding to *Ex Parte Young*, 209 U.S. 123 (1908), and it aimed at "confin[ing] federal court intervention in state government," *Arkansas v. Farm Credit Servs. of Cent. Arkansas*, 520 U.S. 821, 826-27 (1997); see *Rosewell*, 450 U.S. at 522 n.28 ("The [TIA] was only one of several statutes reflecting congressional hostility to federal injunctions issued against state officials in the aftermath of this Court's decision in *Ex parte Young*.") (internal citation omitted).

As the "partial codification of the federal reluctance to interfere with state taxation," *Levin v. Commerce*

Energy, Inc., 560 U.S. 413, 424 (2010) (quoting *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n.* (*NPTC*), 515 U.S. 582, 590 (1995)), the TIA must be interpreted in light of that preexisting doctrine. "'Congress and this Court repeatedly have shown an aversion to federal interference with state tax administration. The passage of the [TIA] in 1937 is one manifestation of this aversion,'" *Hibbs v. Winn*, 542 U.S. 88, 124 (2004) (Kennedy, J., dissenting) (alteration in original) (quoting *NPTC*, 515 U.S. at 586); see also *ibid.* (describing *NPTC* as "summing up this aversion, generated also from principles of comity and federalism, as creating a 'background presumption that federal law generally will not interfere with administration of state taxes'") (quoting *NPTC*, 515 U.S. at 588).

Thus, the purpose of the TIA is to prevent federal courts from "disrupt[ing] the State's tax system." *Ibid.* (citing *Grace Brethren Church*, 457 U.S. at 409 n.22); see also *id.* at 124-25 (Kennedy, J., dissenting) (quoting and citing *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 110 (1981) (quoting *Rosewell*, 450 U.S. at 522, "in turn quoting" *Tully*, 429 U.S. at 73)). The TIA acknowledges the "'imperative need of a State to administer its own fiscal operations.'" *Rosewell*, 450 U.S. at 522 (quoting *Tully*, 429 U.S. at 73). Congress "recognized that the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts." *Fair Assessment*, 454 U.S. at 102-03.

This recognition that sovereigns require well-functioning taxing regimes is consistent with the TIA's roots as a state-tax analogue to the federal Anti-Injunction Act (AIA). The AIA, which precludes injunctions against the collection of federal taxes, "responded to 'the grave dangers which accompany intrusion of the injunctive power of the courts into the administration of the revenue.'" *Hibbs*, 542 U.S. at 122 (Kennedy, J., dissenting) (quoting *South Carolina v. Regan*, 465 U.S. 367, 388 (1984) (O'Connor, J., concurring in judgment)). The AIA "'evidence[s] a congressional desire to prohibit courts from restraining any aspect of the tax laws' administration.'" *Ibid.* (quoting *Regan*, 465 U.S. at 399 (O'Connor, J., concurring in judgment)). The same principle is embodied in the TIA.

B. Important policies of federalism, respect for state sovereignty, and equitable abstention underlie the TIA.

The strong disinclination of federal courts to interfere with state tax administration also finds support in the well-established principle of federalism. See *Tully*, 429 U.S. at 73. Federalism represents a "sensitivity to the legitimate interests of both State and National Governments . . . [through] which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Thus, in *Fair Assessment* this Court explained that federalism is one of the reasons that federal courts "refuse to enjoin the collection of state taxes." 454 U.S. at 111. The TIA, in conjunction with the related doctrine of comity, "serves to minimize the frictions inherent in a federal system of government and embodies longstanding federal reluctance to interfere with state taxation." *Capra v. Cook Cnty. Bd. of Review*, 733 F.3d 705, 713 (7th Cir. 2013) (internal quotation marks omitted); see *Kathrein v. City of Evanston, Ill.*, 752 F.3d 680, 687 (7th Cir. 2014) ("[The TIA] furthers a healthy respect for federalism by preventing federal courts from interfering with the vital state function of collecting taxes.").

1. *State courts are better suited than federal courts to construe state statutes.*

This Court's construction of the TIA's scope has been guided in part by the practical realization that, in challenges to state tax laws, "'federal constitutional issues are likely to turn on questions of state tax law, which . . are more properly heard in the state courts.'" *Grace Brethren Church*, 457 U.S. at 410 (quoting *Perez v. Ledesma*, 401 U.S. 82, 127 n.17 (1971) (Brennan, J., concurring in part and dissenting in part); see *Case Comment, Federal Injunctive Relief in State Tax Cases: Lasalle v. Rosewell*, 93 HARV. L. REV. 1016, 1022 (1980) ("Congress sought to shift the flow of tax cases from federal to state courts."). State tax systems are complex systems with intertwined provisions, making interference by federal courts particularly inappropriate. As this Court has explained:

> 'The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts.'

Levin, 560 U.S. at 422 n.2 (quoting *Perez*, 401 U.S. at 127 n.17 (1971) (Brennan, J., concurring in part and dissenting in part)); see also *id.* at 428 n.7 ("State courts also have greater leeway to avoid constitutional holdings by adopting 'narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests.'") (quoting *Moore v. Sims*, 442 U.S. 415, 429-30 (1979)); *Hibbs*, 542 U.S. at 123 (Kennedy, J., dissenting) (quoting *Grace Brethren Church*, 457 U.S. at 410 (quoting "with approval" a portion of the above passage from *Perez*)).

2. *State courts are better suited than federal courts to fashion remedies that may affect state law.*

As this Court has emphasized, state courts, rather than federal courts, should fashion remedies that involve substantive and discretionary changes to state tax systems. See, e.g., *Levin*, 560 U.S. at 429. In a case like this one, this factor is quite significant. Assuming *arguendo* that petitioner were to prevail on the merits in this case, an appropriate remedy *might* be to simply strike down the Collection Act. See Pet. Br. at 62-63. But it might be to adjust aspects of it to account for, for example, the varying intensity of Internet retailers' contacts with Colorado. If there is room for discretion or experimentation in fashioning a remedy, "surely the [state] courts are better positioned to determine — unless and until the [state] Legislature weighs in — how to comply with the [constitutional] mandate." *Levin*, 560 U.S. at 429 (citing *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 817-18 (1989)); cf. *id.* at 426-27 (explaining that when there is unlawful discrimination in tax classifications, a court could raise one party's taxes as a remedy *or* it could lower the other's); *id.* at 427-28 (noting that ultimately remedy is question of state law).

Such potential complications of remedy distinguish this case from *Hibbs*, where the Court allowed federal jurisdiction over a challenged tax credit. See *Hibbs*, 542 U.S. at 108-10. There, as this Court explained in *Levin*, the only possible remedy, were the tax credits found unconstitutional, would have been to invalidate them altogether. *Levin*, 560 U.S. at 431. And such complications distinguish this case from others, like *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), in which this Court reviewed a state high court's ruling on an issue of federal constitutional law. See *Levin*, 560 U.S. at 427 ("[W]hen this Court — on review of a state high court's decision — finds a tax measure constitutionally infirm, 'it has been our practice,' for reasons of 'federal-state comity,' 'to abstain from deciding the remedial effects of such a holding.'") (quoting *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 176 (1990) (plurality opinion)). But remand to state court is not possible when the lower federal courts take jurisdiction, *id.* at 428, providing another reason why federal jurisdiction in the lower courts is inappropriate.

And even if the hypothetical remedy in *this* case were to involve simply striking down the offending part of the law, the TIA must be read for all cases. Cf. *Hibbs*, 542 U.S. at 125 (Kennedy, J., dissenting) (noting that although that case might not involve disputes over the meaning of state law, such disputes will certainly arise in other cases). Given the need for States to experiment with ways to capture tax revenues due from Internet sales, see Resp. Br. at 5-9, it is unlikely that this case will be the last to challenge the constitutionality of such measures. To the extent that any of those challenges are successful, they might well require the kind of injunctive relief this Court has said is peculiarly inappropriate for federal courts to order. That practical acknowledgment that state courts are in the best position to fashion remedies when state tax laws are found unconstitutional applies to consideration of the Collection Act here and warrants application of the TIA to bar federal court jurisdiction.

3. *Equitable abstention doctrines support a broad reading of the TIA.*

The TIA's preclusion of federal jurisdiction over DMA's action is consistent with abstention principles developed by this Court. Under the doctrine of abstention, "a [d]istrict [c]ourt may decline to exercise or postpone the exercise of its jurisdiction." *Cnty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959). "Federal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723 (1996). The power to abstain "derives from the discretion historically enjoyed by courts of equity." *Id.* at 728. Likewise, federal courts' reluctance to hear cases seeking to enjoin state tax laws stems from the courts' longstanding equitable discretion. See *Grace Brethren Church*, 457 U.S. at 412 (quoting *Dows*, 78 U.S. at 110); *Rosewell*, 450 U.S. at 522.

Abstention principles counsel in favor of requiring DMA's challenge to be brought in state court. The abstention inquiry balances the "strong federal interest in having certain classes of cases, and certain federal rights, adjudicated in federal court" against States' interests in resolving questions of state law and in maintaining control over questions that concern important local problems. *Quackenbush*, 517 U.S. at 728. Thus where the vital concern of protecting "the fiscal integrity" of a State's public assistance program is concerned, abstention is proper. *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977). Similarly here, Colorado's vital concern of protecting its tax revenues is at the forefront of this action, and abstention principles require that these interests be vindicated in state court. See *Quackenbush*, 517 U.S. at 719 (noting that the holding of *Fair Assessment*, 454 U.S. at 115, that a § 1983 action based on enforcement of a state tax scheme could not be maintained in federal court, was based in part on abstention principles).

Moreover, where federal suits challenge complex state statutory schemes, like tax laws, abstention principles have greater force. See *Moore*, 442 U.S. at 427 (abstention principles "reflect the same sensitivity to the primacy of the State in the interpretation of its own laws and the cost to our federal system of government inherent in federal-court interpretation and subsequent invalidation of parts of an integrated statutory framework"). Abstention principles also accord significant weight to the prospect of "undue interference" with Colorado's tax administration and procedures for hearing challenges to its tax laws. See *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013); *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359-60 (1989) (citing *Burford v. Sun Oil Co.*, 319 U.S. 315, 327, 334 (1943)). Finally, abstention principles are applicable where, as here, the "exercise of federal review of the question in a case would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976). Colorado's collection of tax revenues is just such a matter of substantial public concern, as it directly impacts many important state programs including K-12 education, Medicaid, and higher education. JA111-12; see *Dows*, 78 U.S. at 109-10. In sum, application of the TIA's jurisdictional bar to DMA's action is informed, and supported, by the application of well-settled abstention principles as well.

C. The history behind and principles underlying the TIA demonstrate that it must be read to reach cases like this one.

In light of these principles, the TIA cannot be limited only to injunctions concerning statutes that actually impose a tax upon a plaintiff, as petitioners suggest, Pet. Br. at 41-43. In this case, the Collection Act is the part of Colorado's tax regime that enables it to obtain information necessary to enable it to collect sales or use tax on a high volume of transactions. Resp.

Br. at 5-9. Enjoining the operation of this provision is tantamount to enjoining the collection of sales or use tax on those many Internet transactions within its legitimate taxing authority. This would wreak the same havoc on Colorado and its revenue-collecting efforts that federal courts have continually and assiduously avoided, since long before the TIA was enacted. See *Matthews*, 284 U.S. at 525-26; *Boise Artesian*, 213 U.S. at 281; *Dows*, 78 U.S. at 109-10.

DMA's action thus would interfere with state tax administration and revenue collection and is well within the breadth of the TIA. For that reason, petitioner's reliance on *Hibbs* is misplaced. Indeed, *Hibbs* explained that the purpose of the TIA was to restrict district-court jurisdiction "over suits relating to the collection of State taxes." 542 U.S. at 104 (internal quotation marks omitted). While *Hibbs* held that the TIA was not intended to prevent interference "with all aspects of state tax administration," *id.* at 105 (internal quotation marks omitted), the Court went to great lengths to distinguish between actions that seek to avoid the payment of taxes, which are covered by the TIA, and third-party challenges to tax credits that, if successful, would have the effect of increasing state revenue, *id.* at 108-11. Thus, *Hibbs* read this Court's precedents as tethered to "their secure, state-revenue-protective moorings." *Id.* at 106. This case is also firmly tethered to those moorings because here DMA challenges a state tax law that is revenue-generating in its purpose, and if that challenge is sustained, Colorado's ability to collect sales and use tax on a large number of transactions will be severely hampered. DMA's lawsuit, then, is well within *Hibbs*'s understanding of the scope of the TIA.

Nor is it remarkable to apply the TIA to a statute that imposes informational requirements on a party. In *Grace Brethren Church*, for instance, this Court rejected the claim that "recordkeeping, registration, and reporting requirements" imposed on the taxpayer sufficed to overcome the application of the jurisdictional bar. 457 U.S. at 415-17. The fact that the Collection Act imposes recordkeeping requirements on DMA therefore does not insulate this challenge from the TIA's jurisdictional bar.

There is no dispute that in attempting to collect use tax from in-state consumers, Colorado is engaged in a legitimate, and vital, state activity. But the context in which Colorado exercises its taxing authority is defined by this Court's decisions in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), and *Quill*, 504 U.S. 298. Under those cases, Colorado may not require remote Internet sellers to collect and remit sales tax. See Resp. Br. 4-6. As Internet sales account for an increasingly large proportion of sales, States face new hurdles in tax collection, and are left to attempt to collect use tax from consumers themselves with few good options to do so. *Id.* at 16-17. In the post-*Quill* universe, where States are attempting to capture use tax on the increasing volume of Internet sales, the risk of a federal injunction throwing state tax administration "into disarray" is particularly high. See *Rosewell,* 450 U.S. at 527. And particular deference is appropriate with respect to "commercial matters over which [states] enjoy[ ] wide regulatory latitude." *Levin*, 560 U.S. at 431. This case is just such a matter.

II. Comity Principles Preclude Federal Court Adjudication of Claims Challenging Revenue-Generating Aspects of State Tax Laws.

Even were this Court to conclude that the TIA does not reach DMA's lawsuit, it should still hold that, based on comity principles, the Tenth Circuit correctly dismissed the case. In *Levin*, this Court rejected the notion that "[a] broad view of the comity cases would render the TIA 'effectively superfluous.'" 560 U.S. 413, 432 (quoting *Commerce Energy, Inc. v. Levin*, 554 F.3d 1094, 1099 (6th Cir. 2009)). Instead, this Court explained the interconnected relationship between comity principles and the TIA, noting that "'the principle of comity which predated the [TIA] was not restricted by its passage,'" *id.* at 424 (quoting *Fair Assessment*, 454 U.S. at 110), and reiterated that "'the [TIA] may be best understood as *but a partial codification* of the federal reluctance to interfere with state taxation,'" *ibid.* (alteration in original) (emphasis added) (quoting *NPTC*, 515 U.S. at 590; *see also id.* at 433-34 (Thomas, J., concurring in judgment) ("Congress' decision to prohibit federal jurisdiction over cases within the [TIA]'s scope did not disturb that jurisdiction, or the comity principles that guide its exercise, in cases outside the Act's purview."). Comity thus provides an additional and independent basis to conclude that district courts may not entertain claims that would frustrate the revenue-raising function of state laws that operate to determine or collect state tax liabilities.

A. Comity serves the essential purpose of protecting state taxation from unnecessary and intrusive federal court interference.

As discussed, this Court has repeatedly held that federal-law challenges to the administration of state tax laws must be brought in state fora and that federal courts do not provide an alternative avenue to bypass those procedures. Most recently, this Court stated: "More embracive than the TIA, the comity doctrine applicable in state taxation cases restrains federal courts from entertaining claims for relief that risk disrupting state tax administration." *Levin*, 560 U.S. at 417; see *NPTC*, 515 U.S. at 586 ("We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration."); *Fair Assessment*, 454 U.S. at 101-02 (comity prevented a federal court from adjudicating a claim for damages in § 1983 action seeking redress for "the allegedly unconstitutional administration of a state tax system"); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 296-301 (1943) (extending comity principles to declaratory judgment action concerning constitutionality of state tax).

Comity thus applies in cases like this one, in which the petitioner could raise the same claims in state court (and has in fact done so, Resp. Br. 10), but has attempted to invoke the judicial authority of the federal courts to prevent the operation of a state law whose central purpose is to enable the State to ascertain and collect indisputably lawful taxes. Indeed, "[c]omity's constraint has particular force when lower federal courts are asked to pass on the constitutionality of state taxation of commercial activity." *Levin*, 560 U.S. at 421.

B. Comity is not limited to suits by taxpayers challenging state laws that directly impose or enforce their tax liabilities.

This Court should reject the limitations on comity that petitioner advocates. The doctrine is not limited to suits brought by a taxpayer challenging a law establishing or enforcing the taxpayer's own liability. Nor is it limited to laws that directly determine or enforce a tax liability, as opposed to laws that provide a mechanism to achieve those objectives.

This Court has never held that a necessary element for applying comity is that the action be brought by a taxpayer disputing its own tax liability. To the contrary, in *Fair Assessment*, the first-named plaintiff was not a taxpayer affected by the allegedly unconstitutional aspects of the local tax laws, but instead was a nonprofit corporation formed by taxpayers "to promote equitable enforcement of property tax laws." 454 U.S. at 105. The

Court nonetheless treated it the same as the other plaintiffs, who were taxpayers, based on the same comity principles at issue here. *Id.* at 105-07.

More recently, *Levin* specifically rejected the conclusion that the comity doctrine is limited only to suits brought by taxpayers asserting federal-law grounds to reduce their own alleged tax liability. *Levin*, 560 U.S. at 425-26. To the contrary, *Levin* held that comity precluded federal court jurisdiction over a suit by commercial actors seeking to *increase* their competitors' taxes. *Ibid*. Thus, no argument can be made that comity applies only to suits by a taxpayer to *reduce* its own tax burden.

Nor does *Levin* suggest that comity principles are limited to suits filed by taxpayers asserting a constitutional or other federal-law attack on state laws that determine or collect their own tax liabilities. Distinguishing the Court's prior decision in *Hibbs,* which dealt almost entirely with the TIA, *Levin* pointed out that the *Hibbs* plaintiffs' claim "was essentially an attack on the allocation of state resources for allegedly unconstitutional purposes," similar to earlier suits contesting "state allocations to maintain racially segregated schools," and that the plaintiffs' "own tax liability was not a relevant factor" for their claim. *Id.* at 430. *Hibbs*' brief comment in a footnote about comity, *Levin* explained, was best read as affirming that comity was a "poor fit" for a "federal challenge by a third party who objected to a tax credit received by others, but in no way objected to her own liability under any revenue-raising tax provision." *Ibid*. Thus, *Levin* distinguished between challenges to allocations of state resources and challenges to taxing regimes. Read in context, these statements cannot fairly be read to establish a new rule allowing federal court jurisdiction over claims challenging revenue-generating features of a State's tax laws except for suits by a taxpayer contesting some aspect of its own tax liability.

Moreover, limiting the comity doctrine to suits by a taxpayer, as DMA argues, would not only defeat its core purpose in many cases, but would also encourage creative challenges to state tax administration in federal court through third-parties. In many circumstances, a person other than the ultimate taxpayer (even if not a proxy for the taxpayer's interests, such as a voluntary association) may have standing under Article III to bring an action alleging that some aspect of state tax law is unconstitutional. Consequently, restricting comity's reach to suits brought by a taxpayer challenging a law affecting its own tax liability would invite federal court adjudication of claims that seek to impede the determination and collection of state tax liabilities. But such suits, no less than challenges by taxpayers to state laws governing their own tax liability, are equally offensive to comity principles.

Levin also specifically rejected the notion that *Hibbs* "diminished the force" of the comity doctrine, stating that the Court "intended no such consequential ruling." *Id.* at 430. And *Levin*'s many references to comity negate any suggestion that it narrowed the doctrine's scope, especially without having declared that intention explicitly. See, e.g., *id.* at 417 ("[t]he comity doctrine applicable in state taxation cases restrains federal courts from entertaining claims for relief that risk disrupting state tax administration"); *id.* at 422 (stating that the Court's prior comity decisions show "a proper reluctance to interfere by prevention with the fiscal operations of the state governments") (citation and internal quotation marks omitted); *id.* at 429 (noting that if the federal court granted the relief the petitioners requested and "reshape[d] the relevant provisions of Ohio's tax code," it "would engage in the very interference in state taxation the comity doctrine aims to avoid").

There is likewise no merit to the notion that, for matters of state tax administration, comity applies only to suits targeting laws that directly implement tax collection, as opposed to laws that indirectly support a State's tax scheme. See Pet. Br. at 59. Even if such a distinction could be practically applied, the policy underlying the comity doctrine would be frustrated by such a limitation. That policy, which reflects the notion that tax revenues are the lifeblood of state government, applies to every aspect of a State's law that is integral to the revenue-generating operation of its tax scheme. State tax laws, like their federal counterparts, are replete with provisions that do not directly impose a tax or implement its collection, but instead establish auxiliary modes for implementing the tax, such as third-party reporting requirements. Such integral laws are not beyond comity's reach.

C. Comity bars DMA's action.

Even more clearly than in *Levin*, where the plaintiffs challenged tax benefits available to other taxpayers, comity dictates that the federal court should decline to exercise jurisdiction here. Unlike a tax credit, which operates to reduce a State's tax revenues, the informational requirements imposed by the Collection Act enable Colorado to *collect* taxes, by identifying taxpayers and their use-tax liabilities. Indeed, as a practical matter, this provision may well be indispensable to the accomplishment of that goal and the corresponding collection of the related tax revenues.

While the Court in *Levin* relied on a "confluence of factors" to conclude that comity barred that case, 560 U.S. at 431-32, it did not purport to establish a new legal test that must be applied in every case. Nor did it hold that the particular circumstances it identified as supporting comity's application in that case were collectively necessary to the application of the doctrine in other cases. See *id.* at 432 (stating that, "[i]ndividually, these considerations *may* not compel forbearance on the part of federal district courts") (emphasis added).

In any event, the factors the Court relied on in *Levin* demonstrate that comity principles apply here as well. First, the law challenged by petitioner, requiring some of its members to provide information regarding their sales to Colorado residents, does not implicate a "fundamental right" or trigger "heightened judicial scrutiny." *Id.* at 431. Emphasizing that the suit involved a law addressing "commercial matters over which Ohio enjoys wide regulatory latitude," *ibid.*, *Levin* easily recognized that the challenged law was subject only to traditional Commerce Clause analysis. Moreover, while the tax provisions challenged in *Levin* required the plaintiff to pay higher taxes than its local counterparts, here the Collection Act actually treats out-of-state retailers with more deference than local ones. In-state retailers have no choice but to collect and remit sales and use taxes; out-of-state retailers can choose to do so (and some do), but they can instead choose the less onerous reporting mechanism DMA now challenges. In effect, then, petitioner's constitutional claims seeks to protect economic discrimination in favor of its members, not, as in *Levin*, to eliminate economic discrimination against them.

The second consideration emphasized in *Levin* — that the plaintiff there was seeking to improve its competitive position compared to other market participants — similarly supports the conclusion that comity applies in situations like the one presented here. The unmistakable goal of petitioner's claims in this case is to maintain for its members the competitive advantage they have over in-state retailers. If out-of-state retailers do not collect and remit sales or use taxes on their purchases, Colorado customers, either innocently or with the goal of evading taxes, may choose them over local retailers because their goods will appear to have a lower out-of-pocket cost. Regardless of whether petitioner's Commerce Clause challenge has merit as a constitutional matter, this aspect of its challenge further diminishes its argument that it should be able to pursue that claim in federal court.

The last factor on which the Court relied in *Levin* — that a state court was uniquely positioned to implement the appropriate remedy if the plaintiffs' claim had merit, choosing between eliminating the contested tax benefits or extending them to other parties, *id*. at 431-32 — further supports the application of comity here because Colorado state courts are in a better position to determine the appropriate remedy. See *supra* pp. 14-16.

Thus, this case fits comfortably within the scope of comity's application to challenges to state tax administration. Petitioner's suit challenges a statute that is integral to the revenue-generating operation of Colorado's tax laws. Allowing petitioner's claim to proceed in federal court, despite the availability of equivalent relief in state court, would conflict with the very interests that lie at the heart of comity principles in the area of state tax administration and would have the unwarranted effect of treating state courts as inferior guardians of constitutional rights.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS
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DIRECT MARKETING ASSOCIATION,
Petitioner,

v.

BARBARA BROHL, IN HER CAPACITY AS EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

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INTEREST OF *AMICUS CURIAE*[1]

This *amicus curiae* brief in support of DMA's position in this appeal is filed by the Institute for Professional in Taxation ("IPT"). IPT is a Section 501(c)(3) non-profit educational organization founded in 1976 with its principal place of business in Atlanta, Georgia. IPT is dedicated to the uniform and equitable administration of taxes, the minimization of the cost of tax administration and compliance, and the promotion and preservation of fair and non-discriminatory taxation by state and local governments.

IPT has over 4,500 memberships across the United States and in Canada. IPT's members are employed by and/or represent numerous businesses providing products and services throughout the United States, including businesses located outside of Colorado that make retail sales to customers located in Colorado. These businesses are directly affected by Colorado's sales and use tax notice and reporting requirements, and IPT believes that the Tenth Circuit's ruling (the "Ruling"), if adopted by this Court, would be a dramatic reinterpretation of the TIA—a reinterpretation that would give the TIA a far broader scope than this Court found in *Hibbs v. Winn*, 542 U.S. 88 (2004). Accordingly, IPT urges the Court to reverse the

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[1] In satisfaction of Supreme Court Rule 37.6, IPT represents that no portion of this brief was written by counsel for any party to this appeal, and no party (or counsel for any party) made a monetary contribution intended to fund the preparation or submission of this brief. This brief was funded entirely by *amicus curiae* and its counsel. Both parties have filed blanket consents with the Clerk of this Court consenting to the filing of briefs by *amici curiae*.

Tenth Circuit's holding that it lacked jurisdiction over the DMA's appeal and make clear that the TIA does not bar federal court jurisdiction over cases that would not legally prevent a state from "assessing, levying, or collecting" a tax from a single taxpayer.

SUMMARY OF THE ARGUMENT

This appeal concerns the proper scope and application of the TIA, which provides that

> [t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341. In the district court, the DMA sought to enjoin a Colorado law that imposes notice and reporting requirements on retailers that (i) sell tangible personal property to Colorado residents but (ii) do not collect Colorado sales or use tax on those sales because they are not legally required to do so. The district court agreed with the DMA and granted a permanent injunction to enjoin enforcement of the notice and reporting obligations imposed under the Colorado law. *See* Appendix to Petition for Certiorari, at B-1. The Tenth Circuit reversed, however, holding that the TIA bars federal court jurisdiction whenever the suit seeks to enjoin "state laws enacted to ensure compliance with and increase use tax collection. ." *Direct Marketing Ass'n v. Brohl*, 735 F.3d 904, 913 (10th Cir. 2013); *see also id.* at 914 ("Colorado enacted the notice and reporting requirements to increase taxpayers' compliance with use tax laws and thereby increase use tax

collection."). The Tenth Circuit reached that conclusion *even though it acknowledges that the DMA's suit will not actually affect the tax liability of a single Colorado taxpayer. See id.* at 913 ("Even if DMA's constitutional attack on the notice and reporting obligations were successful, Colorado consumers would still owe use taxes by law.").

The DMA has appealed from that overly-broad interpretation of the TIA, and the IPT files this *amicus* brief in support of the DMA to urge this Court to rule in favor of the DMA and to clarify that the TIA does not bar federal court jurisdiction over a suit challenging a secondary aspect of state tax administration, *where the outcome of the suit will not legally prevent Colorado from assessing or collecting tax from a single taxpayer.* Otherwise, IPT fears that upholding the Tenth Circuit's interpretation will invite states to manipulate their laws in order to bring them within the newly-expanded scope of the TIA, thereby severely restricting citizens' ability to challenge many state laws in federal court—even state laws that have little or nothing to do with the "assessment, levy, or collection" of state taxes.

STATEMENT OF THE CASE

The DMA is a non-profit trade association that supports businesses and non-profit organizations that use multi-channel marketing methods (*e.g.*, catalogs, magazines, newspapers, broadcast media, and the internet). In June of 2010, the DMA filed a complaint which sought to enjoin application of the notice and reporting requirements imposed by Colo. Rev. Stat. §§ 39-21-112(3.5)(c) and (d) (the "Colorado Act"), which had been enacted by the Colorado General Assembly in February of 2010. The Colorado Act requires "each retailer that does not collect Colorado sales tax"—*i.e.*, retailers that are located outside of Colorado and which make sales to Colorado residents, but which do not have any "physical presence" in Colorado (hereinafter, "Remote Retailers")—to satisfy three separate obligations:

(1) Transactional Notice: In connection with each sale to a Colorado resident, Remote Retailers must notify the purchaser of the purchaser's obligation to self-report and pay Colorado use tax on the transaction;

(2) Annual Purchase Summary: With respect to any purchaser with over $500 in calendar-year purchases from a Remote Retailer, the Remote Retailer must provide a detailed listing of transactions along with a reminder of the purchaser's obligation to self-report and pay Colorado tax, and an additional disclosure regarding the Remote Retailer's obligation to submit the list of transactions to the Colorado Department of Revenue (the "Department"); and

(3) Customer Information Report: Each Remote Retailer must submit an annual report to the Department listing its customers, their addresses, and the total amount of each customer's purchases during the year.

Colo. Rev. Stat. §§ 39-21-112(3.5)(c)-(d); *see also* 1 Colo. Code Regs. §§ 201-1:39-21-112.3.5.

Under the Colorado Act, non-collecting retailers are subject to substantial penalties if they fail to comply with the Act's notice and reporting requirements. *See* 1 Colo. Code Regs. § 201-1:39-21-112.3.5(2)(f) ($5 penalty per Colorado sale as to which the retailer does not provide the Transactional Notice, up to a $50,000 cap for the first year); *see id.*, subsection (3)(d) ($10 penalty per failure to provide an Annual Purchase Summary, up to a $100,000 cap for the first year); *see id.*, subsection (4)(f) ($10 penalty per excluded name from the Customer Information Report submitted to the Department, up to a $100,000 cap for the first year).

It is undisputed in this case that Colorado residents owe Colorado use tax on purchases of tangible personal property when the Remote Retailer does not collect and remit such tax to the Department. *See Direct Marketing*, 735 F.3d at 906-07, 913. It is also undisputed that pursuant to this Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Commerce Clause to the U.S. Constitution prohibits Colorado from requiring retailers who lack "physical presence" in Colorado to collect tax on sales to Colorado residents. *See, e.g., Direct Marketing*, 935 F.3d at 907. Accordingly, in an attempt to make an end-run around the Commerce Clause's protections, the Colorado Act's notice and reporting requirements appear to have been intended to coerce either (i) the state's residents into self-reporting and remitting their use tax liabilities; or (ii) the non-collecting Remote Retailers into collecting and remitting taxes on sales to Colorado customers, simply to avoid the expense and administrative complications of complying with the Colorado Act (regardless of the fact that Remote Retailers are protected from such collection obligations by the Commerce Clause for the very reason that multi-jurisdiction tax collection and reporting is so onerous).

Because the DMA's members were directly affected by the Colorado Act's new requirements, the DMA filed a suit in federal court, seeking an injunction against application of the Colorado Act because it violates, *inter alia*, the Commerce Clause. *See* Joint App. at 2 (noting docket entry for First Amended Complaint). The district court issued an injunction barring application of the Colorado Act's notice and reporting requirements without discussing the TIA. *See* Appendix to Petition for Certiorari, at B-1 – B-25.

The Department appealed to the Tenth Circuit; in its briefs before the Tenth Circuit, the Department asserted that the TIA did not bar jurisdiction. *See* Brief for Petitioner, at 13. Nevertheless, without seeking additional briefing from the parties, the Tenth Circuit held that the TIA divested the federal courts of jurisdiction over the DMA's challenge to the Colorado Act, reasoning that the TIA bars federal jurisdiction over any suit seeking to enjoin a state law "enacted to ensure compliance with and increase use tax collection. ." *Direct Marketing*, 735 F.3d at 913. In so holding, the Tenth Circuit acknowledged contrary opinions regarding the scope of the TIA from the First and Second Circuits but strained to distinguish them. *See United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003); *Wells v. Malloy*, 510 F.2d 74 (2d Cir. 1975).

For the reasons explained herein, the Tenth Circuit's interpretation of the scope of the TIA is dramatically overbroad. Accordingly, IPT files this *amicus curiae* brief in support of the DMA and to urge this Court to clarify that the TIA does not bar a suit challenging a secondary aspect of state tax administration—like the Colorado Act's notice and reporting requirements—where the outcome of the suit will not legally affect the tax liability of any taxpayer.

ARGUMENT IN SUPPORT OF PETITIONER

I. Under the Tenth Circuit's Overly-Broad Interpretation, the TIA Bars Federal Court Jurisdiction Over Any Law That Might Increase a State's Collection of Tax Revenue.

A. The Tenth Circuit Did Not Cite Any Cases or Other Authorities in Support of Its Interpretation of the TIA.

In *Direct Marketing Ass'n v. Brohl*, 735 F.3d 904, 910 (2013), the Tenth Circuit recognized that it needed to consider the TIA's potential jurisdictional limitation before considering the DMA's substantive challenge to the Colorado Act. It moved quickly to mention this Court's seminal decision regarding the scope of the TIA, *Hibbs v. Winn*, 542 U.S. 88 (2004), and it recognized this Court's admonition that the TIA "proscribes interference only with those aspects of state tax regimes that are needed to produce revenue—i.e., assessment, levy, and collection." *Direct Marketing*, 735 F.3d at 911 (citing *Hibbs v. Winn*, 542 U.S. at 105 n.7).

However, rather than directly apply the language and reasoning of *Hibbs v. Winn*, the Tenth Circuit instead embarked upon interpreting the TIA through the lens of its own most recent decisions regarding the TIA. *See Direct Marketing*, 735 F.3d at 911-12. It then noted that some federal courts have applied the TIA to suits by third parties who sought to "disrupt" state tax collection, but it failed to identify what "disruption" means in the context of the TIA, and it added the unusual note that the Supreme Court in *Hibbs v. Winn* "did not criticize these decisions." *See id.* at 912. The Tenth Circuit then proceeded to state that the "key question [in applying the TIA] is whether the plaintiff's lawsuit seeks to prevent the State from exercising its sovereign power to collect revenues," but again without any discussion of the precise meaning of any term relevant to its "key question." *Id.* at 912 (citing *Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007)) (punctuation omitted). It is therefore not terribly surprising that the Tenth Circuit ended up with an interpretation of the TIA that is both contrary to the language of the statute and in contravention of this Court's holding in *Hibbs v. Winn*; after all, it did not closely consider either as it began to interpret the statute's scope.

The next step in the Tenth Circuit's interpretation of the TIA appears to have led to its new, dramatically over-expansive reading of the statute. Noting that the TIA prohibits suits that would "*restrain* the . . . collection" of a state tax, the Tenth Circuit turned to the dictionary to find the "broader ordinary meaning" of the term "restrain," and then recited this Court's "instruction that the TIA is a broad jurisdictional prohibition." *Direct Marketing*, 735 F.3d at 912-13 (emphasis in original). Thus, primed to interpret and apply the TIA "broadly," the Tenth Circuit proceeded to apply the TIA using a test that stretches the scope of the TIA far beyond any court's prior application of that statute. The Tenth Circuit held that the DMA's suit was barred under the TIA because a

> lawsuit seeking to enjoin state laws enacted to ensure compliance with and increase use tax collection, like DMA's challenge here, would "restrain" state tax collection. Such a lawsuit, if successful, would limit, restrict, or hold back the state's chosen method of enforcing its tax laws and generating revenue.

Id. at 913. In reaching that broad new holding, the Tenth Circuit did not cite to *any* cases or other authorities. *Id.* Furthermore, it acknowledged that the DMA's suit was unlike other TIA cases, in that "[e]ven if DMA's constitutional attack were successful, Colorado consumers would still owe use taxes by law." *Id.* Nevertheless, the Tenth Circuit concluded—again, without citing to any case or other authority—that the suit's mere "potential to restrain tax collection" triggers application of the TIA and precludes federal court jurisdiction. *See id.*; *see id.* at 917 ("The state's notice and reporting obligations, while not taxes themselves, were enacted with the sole purpose of increasing use tax collections.").

As discussed in the following sections, the Supreme Court (in *Hibbs v. Winn*) and all of the federal circuit courts to have considered the TIA (other than the Tenth Circuit) have held that the scope of the TIA is not nearly so broad.

B. The TIA Does Not Bar Federal Court Jurisdiction Over a Suit Whose Outcome Will Not Affect the Tax Liability of a Single Taxpayer.

According to this Court, the TIA was never intended "to prevent federal court interference with all aspects of state tax administration"; rather, the TIA "proscribes interference *only* with those aspects of state tax regimes that are needed to produce revenue—*i.e.*, assessment, levy, and collection." *Hibbs v. Winn*, 542 U.S. at 105, 105 n.7 (emphasis added). Yet despite acknowledging this Court's discussion of the scope of the TIA in *Hibbs v. Winn*, the Tenth Circuit ignored that precedent and adopted its own interpretation of the scope of the TIA in complete contradiction of *Hibbs*, holding that the TIA bars federal jurisdiction *every time* the challenged law at issue is intended to "increase tax collections." *See Direct Marketing*, 735 F.3d at 914, 917.

The holdings of other federal circuit courts—decisions issued both before and after *Hibbs v. Winn*—echo the thoughtfully delineated scope of the TIA as set forth in *Hibbs*. Collectively, those cases demonstrate that the TIA has never been applied as broadly as the Tenth Circuit did in this case; furthermore, they demonstrate that the TIA has never been understood to bar federal jurisdiction over a suit *when the suit's outcome will not affect the tax liability of a single taxpayer*. *See, e.g., Hibbs v. Winn*, 542 U.S. at 107 [illegible] In sum, this Court has interpreted and applied the TIA only in cases Congress wrote the Act to address, *i.e.*, cases in which state taxpayers seek federal court orders enabling them to avoid paying state taxes."); *Bellsouth Telecommunications, Inc. v. Farris*, 542 F.3d 499, 503-04 (6th Cir. 2008) ("The [TIA] does not strip federal courts of jurisdiction over all claims that might, after this or that happens, have *some* negative impact on local revenues; it strips jurisdiction over claims seeking to enjoin the collection of State 'tax revenue.'") (emphasis in original) (citing *Wilbur v. Locke*, 423 F.3d 1101, 1110 (9th Cir. 2005)); *United Parcel Service, Inc. v.*

Flores-Galarza, 318 F.3d 323, 331 (1st Cir. 2003) ("Not every statutory or regulatory obligation that may aid the Secretary's ability to collect tax is immune from attack in federal court."); *Hexom v. Oregon Dep't of Tax.*, 177 F.3d 1134, 1136 (9th Cir. 1999) ("Congress did not intend to remove federal court jurisdiction whenever some state revenue might be affected somehow."); *Dunn v. Carey*, 808 F.2d 555, 558 (7th Cir. 1986) ("Although the district court concluded that § 1341 applies to any federal litigation touching on the subject of state taxes, neither the language nor the legislative history of the statute supports this interpretation.").

But perhaps the most cogent explanation of the scope of the TIA was offered by Judge Friendly in *Wells v. Malloy*, 510 F.2d 74 (2d Cir. 1975), in which he explained:

> "Collection," of course, could be read broadly to include anything that a state has determined to be a likely method of securing payment.
>
> We do not believe, however, that Congress intended to go so far. The context and the legislative history .. lead us to conclude that, in speaking of "collection," Congress was referring to methods similar to assessment and levy, *e.g.*, distress or execution that would produce money or other property directly, rather than indirectly through a more general use of coercive power. Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law going to the validity of the particular taxes *imposed upon them*. . .

Id. at 77 (citations omitted) (emphasis added). Thus, numerous federal courts—including this Court—have considered the scope of the TIA and have concluded that it was not intended to bar any and all actions that might somehow affect state tax revenues; rather, the TIA has been applied only when the action will directly affect the assessment, levy, or collection of taxes *from a particular taxpayer*.

The Tenth Circuit actually considered *Wells* in its decision below and attempted to distinguish its holding from that court's decision. *See Direct Marketing*, 735 F.3d at 915-16. The Tenth Circuit explained that in *Wells*, the plaintiff sought to enjoin a Vermont law "that required suspension of his driver's license for failure to pay motor vehicle taxes"—taxes that were undeniably owed by the taxpayer. *Id.* (citing *Wells v. Malloy*, 510 F.2d at 76). According to the Tenth Circuit, its holding is distinguishable from the decision in *Wells*, because the DMA lawsuit "targets measures that attempt to ensure tax compliance in the first instance," while the provision at issue in *Wells* was a sanction "imposed after a taxpayer has admittedly refused to pay taxes." *Id.* at 916. It added that the Colorado Act is "not a reactive and punitive 'general use of coercive power' to entice tax payment from individuals who admittedly refuse to pay ." *Id.* Thus, by the Tenth Circuit's reasoning, the TIA bars the DMA's suit because it involves a challenge to a Colorado law that is intended to increase tax compliance "in the first instance," rather than to punish a delinquent taxpayer with a non-tax-related penalty.

The Tenth Circuit's attempt to distinguish *Wells v. Malloy* is glaringly deficient. First, the Second Circuit's attempt to precisely define the TIA's use of the term "collection" serves to highlight that the Tenth Circuit's interpretation of that same term is much too broad; under the Tenth Circuit's holding, "collection" in the TIA applies to any activity that is in any way related to "generating revenue." *Direct Marketing*, 735 F.3d at 913. *Contrast id.* at 917 ("The state's notice and reporting obligations, while not taxes themselves, were enacted with the sole purpose of increasing use tax collection.") *with Wells*, 510 F.2d at 77 (detailed discussion, including legislative history, of the meaning of the term "collection" in the TIA) *and Hibbs v. Winn*, 542 U.S. at 101 ("In § 1341 and tax law generally, an assessment is closely tied to the collection of a tax, *i.e.*, the assessment is the official recording of liability that triggers levy and collection.").

Second, the distinction between a tax "compliance" measure and a tax "coercion" measure is much finer than the Tenth Circuit acknowledges. According to the Tenth Circuit, the Vermont provision in *Wells* was "coercive" because it was a punishment imposed on a delinquent taxpayer. However, what if the plaintiff had instead been required to pay his motor vehicle tax as a prerequisite to receiving or renewing his driver's license? That law, while nearly identical to the *Wells* provision in practical effect, would appear to be a "compliance" measure under the Tenth Circuit's reasoning. And what if the tax that must be paid as a prerequisite was not a motor vehicle tax, but some other tax (such as the use tax at issue in this case)? The Tenth Circuit's holding suggests that any such "tax compliance" measure could not be challenged in federal court pursuant to the TIA, because such measure is intended to increase the state's tax collections (rather than to punish a delinquent taxpayer).

Finally, the notice and reporting requirements in the Colorado Act can only be described as exactly the type of "coercive" measures to which Judge Friendly was referring in *Wells*. As described *supra*, the Colorado Act imposes three obligations on Remote Retailers: a Transactional Notice that must be sent with each transaction; an Annual Purchase Summary that must be sent by Remote Retailers to purchasers who make over $500 in purchases during the year; and the Customer Information Reports that the Remote Retailers must send to the Department with details regarding each customer and the total amount of its purchases during the year.

None of those requirements involves an "assessment, levy, or collection" of any state tax, and upholding the DMA's challenge to any or all of those obligations will not have any legal impact on the Department's ability to "assess, levy, and collect" use taxes from the taxpayers who owe them. *See Direct Marketing*, 735 F.3d at 913 ("Even if DMA's constitutional attack were successful, Colorado consumers would still owe use taxes by law."). Thus, the intention behind the Colorado Act's requirements is apparent: to "coerce" Colorado residents into self-assessing their use tax obligations (by reminding them of their obligations and informing them that the Remote Retailer will disclose such purchases to the Department) and/or to "coerce" the Remote Retailers into beginning to collect tax (so that they are no longer subject to the onerous notice and reporting requirements, and substantial penalties, of the Colorado Act). Indeed, the Department's Tax Policy Director admitted as much by stating the state's hope that the Remote Retailers would find the Colorado Act's requirements so "unpleasant" that they would voluntarily begin collecting Colorado use tax, rather than comply with the Act's notice and reporting requirements. *See* Brief for Petitioner, at 45 n.8.

Ultimately, it should not be dispositive whether the notice and reporting requirements in the Colorado Act are "tax compliance" measures (as characterized by the Tenth Circuit) or "coercive" measures. Moreover, IPT avers that the Tenth Circuit's lack of authority for its expansive new interpretation of the TIA, coupled with its thin attempt to distinguish its holding from the careful language of *Wells* and other important cases to have interpreted the TIA, demonstrates just how far the Tenth Circuit has colored outside the lines in this case. The TIA plainly does not turn on whether a law is somehow related to a state's "enforcement" of a tax or to tax "compliance" in general (whatever "enforcement" and "compliance" mean as used by the Tenth Circuit), and it certainly does not bar federal court jurisdiction whenever the challenged state law was enacted to "increase tax revenues." *See, e.g., United Parcel Service, Inc. v. Flores-Galarza*, 318 F.3d 323, 331 (1st Cir. 2003) ("Not every statutory or regulatory obligation that may aid the Secretary's ability to collect tax is immune from attack in federal court.").

Thus, IPT files this *amicus curiae* brief in order to urge the Supreme Court not to countenance the Tenth Circuit's broad expansion of the TIA's jurisdictional bar in this case. Instead, the Court should reiterate its prior holdings and clarify that the TIA applies only when the action will directly affect the assessment, levy, or collection of taxes *from a particular taxpayer*. *See, e.g., Hibbs v. Winn*, 542 U.S. at 107 ("In sum, this Court has interpreted and applied the TIA only in cases Congress wrote the Act to address, *i.e.*, cases in which state taxpayers seek federal court orders enabling them to avoid paying state taxes."); *Wells*, 510 F.2d at 77 (In enacting the TIA, "Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law going to the validity of the particular taxes imposed upon them ."); *see also id.* Brief of Petitioner, at 18-21 (tracing history of cases interpreting the TIA and identifying the three elements of a "prototypical" suit to which the TIA has been applied as a bar).

II. To Uphold the Tenth Circuit's Interpretation Would Invite States to Manipulate Their Laws—Including Non-Tax Laws—To Come Within the TIA's Broad New Scope.

A. If the Tenth Circuit's Holding Stands, a State Will Be Able to Block Its Citizens' Ability to Challenge a State Law in Federal Court Simply By Tying That Law to a Tax Collection Measure.

According to the Tenth Circuit, a law is sufficiently related to the "collection" of tax (and therefore triggers application of the TIA) so long as it was enacted with the purpose of "increasing tax collection." *See, e.g., Direct Marketing*, 735 F.3d at 914, 917. However, as discussed in this section, upholding the Tenth Circuit's interpretation would invite states to manipulate their laws—including *non-tax laws*—by tying the new law in some way to the state's collection of tax revenues, thereby triggering application of the TIA and prohibiting many citizens from challenging questionable state laws in federal court.

In its decision, the Tenth Circuit insists that it would not interpret the TIA to apply "to any action challenging a state law that could possibly secure tax payment." *See id.* at 916. However, while the Tenth Circuit claims that it would not apply the TIA to "coercive" measures, upholding its broad application of the TIA to any and all "tax compliance" measures would create a substantial opening for states to block citizens' access to federal courts by tying new or revised laws—including laws that have nothing to do with taxes—to the state's tax reporting, enforcement, and/or collection mechanisms. Because the TIA applies with respect to state sales/use taxes (*i.e.*, the type of tax that is at issue in this case) as well as *all other types of state and local taxes*, it is important to note that states would have a wide variety of tax types and tax provisions with which to clothe a new law in the guise of tax collection. For example:

- Bank Reporting Requirements: In order to verify whether individuals and entities are reporting all of their income and properly filing all of their required tax returns, State X could pass a law requiring banks to turn over the bank statements and other bank transaction information with respect to their individual and entity customers. Under the Tenth Circuit's holding, both the bank and any affected citizen would be unable to challenge the law in federal court on constitutional grounds because the law was enacted to increase state tax collections.

- Employee Personal Information Reporting: In order to determine whether employees were reporting all of their income and otherwise complying with the state's tax laws, State X could pass a law requiring employers to collect and turn over detailed personal information regarding its employees. Again, under the Tenth Circuit's holding, such an aggressive and intrusive law would not be subject to constitutional challenge in federal court, so long as it was enacted for the purpose of "increasing tax collection," even if it merely does so indirectly by providing information that allows the state to assess taxpayers for any amounts determined to be owed. *Cf. Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 763-64 (10th Cir. 2010) (holding that the TIA did not bar federal court jurisdiction of a challenge to an Oklahoma employment provision related to the employment of illegal aliens, where compliance with the verification requirement did not directly generate any revenue for the state; according to the court, "It strains credulity to argue that the primary purpose of a law is to raise revenue when compliance with the law produces no revenue at all.").

- Licenses and Permits: In order to verify and ensure compliance with any type of tax (including but not limited to income taxes, franchise taxes, sales taxes, property taxes, or business license taxes), State X could pass a law requiring citizens to pay all of their taxes and receive a "tax clearance certificate" as a prerequisite to issuing numerous types of government-issued licenses and permits (*e.g.*, gun permits, driver's licenses, fish and game licenses, business licenses, marriage licenses, *etc.*). Under the Tenth Circuit's holding, imposing a tax compliance prerequisite should trigger application of the TIA, because the state law is being used to ensure tax compliance "in the first instance" and to increase tax collections. *Cf. Wells v. Malloy*, 510 F.2d at 76-77 (holding that the TIA did not bar federal jurisdiction for a challenge to Vermont's law which suspended the citizen's driver's license because of his failure to pay motor vehicle taxes).

- Notice and Reporting Requirements for Shippers: Finally, a state could extend notice and reporting requirements (similar to those in the Colorado Act) to the interstate *shippers* who deliver Remote Retailers' sales to the purchasers located within the state. The shippers would not be able to bring any constitutional challenges in federal court under the Tenth Circuit's interpretation, because the law would be intended to increase the state's tax collections by (a) reminding purchasers of their tax obligations; and (b) notifying them

> of their annual shipments and disclosing that the shipper will be reporting such shipments to the state.

IPT could continue to proffer examples that become more and more extreme, but it believes that the previous examples readily illustrate the danger of the Tenth Circuit's expansive interpretation of the scope of the TIA. Furthermore, as those examples help to demonstrate, in interpreting the TIA it is important to make sure that the practical effect of a state's law is considered, and whether a state's "assessment, levy, or collection" of tax from a taxpayer is truly implicated. Otherwise, states will be able to manipulate application of the TIA by placing regulations and requirements into the tax code, or by labeling such provisions as "tax compliance" measures, even if the laws in question are not directly correlated to the assessment of any taxpayer's tax liability or to the levy or collection of any taxpayer's taxes (rather, the only requirement, according to the Tenth Circuit, is that the challenged law be the state's "chosen means" of increasing its tax collections). *See Direct Marketing*, 735 F.3d at 917; *cf. Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 284 (1977) (citations omitted) (discussing the *Spector* rule, which had come to operate "only as a rule of draftsmanship," resulting in situations where "'the use of magic words or labels' could 'disable an otherwise constitutional levy.'")

In summary, according to the Tenth Circuit's holding—which applies to laws that "restrain the collection" of sales/use taxes as well as *all other* tax types—a state's citizens have no ability to challenge a state law in federal court, so long as the law is a tax "compliance" measure intended to increase the state's tax collections. As described herein, a vast array of state regulations or laws could be written in such a way that they help the state to determine a taxpayer's tax liability or increase the state's tax collections. That does not mean, however, that Congress intended to bar federal jurisdiction for challenges to *any* law that might theoretically increase tax collections, no matter how onerous or intrusive. Such a result would be an absurd perversion of the language of the TIA and would give that statute a scope far beyond its plain language—and far beyond *any* prior interpretation of that statute. Given the non-existent basis from which the Tenth Circuit's broad new interpretation was drawn and the potentially absurd consequences that might follow if that interpretation is upheld, this Court must reverse the Tenth Circuit and clarify that the TIA does not bar any suit in which the outcome will not affect the tax liability of even a single taxpayer.

B. The Tenth Circuit's Holding Undermines the Important Principle of Permitting Federal Courts to Vindicate Federal Rights.

Finally, the Tenth Circuit's overbroad reading of the TIA conflicts with an important principle, which is the professed interest in allowing "federal courts to vindicate federal rights." *See, e.g., Va. Office for Protection and Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011). That principle has been interpreted as being inapplicable to cases in which the "judgment sought would expend itself on the public treasury" (*id.*)—a limitation that matches up neatly with this Court's interpretation of the scope of the TIA in *Hibbs*. *See Hibbs v. Winn*, 542 U.S. at 107 ("In sum, this Court has interpreted and applied the TIA only in cases Congress wrote the Act to address, *i.e.*, cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes."). Thus, the TIA (as properly interpreted in *Hibbs*) actually comports with the principle of having "federal courts vindicate federal rights," as both would permit federal courts to hear a case involving a federal constitutional challenge, so long as the case—like this one—would not affect any taxpayer's state tax liability (and therefore would not "exert itself on the public treasury").

The Tenth Circuit's broad interpretation of the TIA, on the other hand, would bar federal courts from reviewing cases involving fundamental federal rights any time the law at issue might somehow lead to increased tax revenue, no matter how attenuated the connection. That holding undermines the important interest under our federalist system in having federal courts review and decide cases involving fundamental federal rights, which in turn would foreclose citizens' access to federal courts and would lead to a less robust body of federal courts interpreting federal law. *See, e.g., GenOn Mid-Atlantic, LLC v. Montgomery County*, 650 F.3d 1021, 1026 (4th Cir. 2011) ("We cannot overlook the fact that the absence of federal jurisdiction in this case would turn what are truly interstate issues over to local authorities. . . The implications of allowing localities to impose financial exactions exclusively upon single entities of national reach with no accountability in federal court are profound, and we decline to foreclose those federal claims with a jurisdictional bar.").

IPT's examples illustrating how states might manipulate their laws to bar their citizens' access to federal courts bring this important principle into stark relief, as those examples provide a glimpse into the range of sensitive constitutional issues that might be blocked from federal court if the Tenth Circuit's broad interpretation of the TIA were upheld. Thus, the Tenth Circuit's interpretation regarding the scope of the TIA must be reversed, and the Court should clarify that the TIA does not bar federal jurisdiction over a case that will not affect the state tax liability of any taxpayer—a holding that would be consistent with the language of the TIA and would preserve the important federal interest in having federal courts review cases involving federal rights. Otherwise, all of the careful work done by federal courts and this Court over the years in interpreting the scope of the TIA will have been swept away by the Tenth Circuit's simplistic reading.[2]

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[2] Though IPT does not have the space to discuss the principle of comity in any depth, it notes that that principle does not bar jurisdiction over DMA's action, because—unlike in *Levin* and other cases applying the principle—a ruling in this case will in no way legally affect any taxpayer's liability for any tax or prevent the state from taking action against the taxpayers who owe use tax, nor will a ruling in the plaintiff's favor occasion the opportunity for the state to fashion any specific or unique relief to remedy the unconstitutional provision. *See, e.g., Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 425-27 (2010) (holding that comity prevented the exercise of jurisdiction in a case where the plaintiff requested relief that would "increase a competitor's tax burden" and noting the importance of allowing the state the opportunity to fashion the necessary relief). Rather, if the Colorado Act's notice and reporting obligations violate the Commerce Clause, the only remedy will be to invalidate them.

CONCLUSION

For all of the reasons described in this *amicus curiae* brief, IPT urges the Court to reverse the holding of the Tenth Circuit and to clarify the scope of the TIA in accordance with the position espoused by the DMA and by IPT in this brief. The Tenth Circuit's broad interpretation of the TIA would effectively foreclose citizens from access to the federal courts any time a state law might theoretically be related to state tax "compliance" or whenever a state law has been manipulated so as to have the effect of increasing tax revenues. Because that interpretation contravenes the language of the statute and conflicts with the federal courts' interest in vindicating federal rights, the Tenth Circuit's holding should be reversed, and the Court should clarify that the TIA does not bar access to federal courts when a citizen challenges a secondary aspect of state tax administration that will not affect a state's legal ability to assess or collect taxes from any taxpayer.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

No. 13-1032

IN THE

Supreme Court of the United States

DIRECT MARKETING ASSOCIATION,

Petitioner,

v.

BARBARA BROHL,
IN HER CAPACITY AS EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF REVENUE,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF OF INTERESTED LAW PROFESSORS AS *AMICI CURIAE* SUPPORTING RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici curiae are ten professors of law whose research interests include state and local tax law and tax compliance and administration. The names and affiliations (for information purposes only) of amici are included in an addendum to this brief. All of the amici are interested in fair and effective tax administration, as well as the dormant Commerce Clause and its impact on the ability of the states to implement their tax systems consistent with the Constitution.

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[1] In satisfaction of Supreme Court Rule 37.6, amici represent that no portion of this brief was written by counsel for any party to this case, and no party (or counsel for any party) made a monetary contribution intended to fund the preparation or submission of this brief. This brief was funded entirely by amici curiae and their counsel. Both parties have filed blanket consents with the Clerk of this Court consenting to the filing of briefs by amici curiae.

SUMMARY OF ARGUMENT

Amici agree with respondent that the Tax Injunction Act, 28 U.S.C. § 1341 (TIA), bars federal courts from enjoining the operation of the Colorado Statute at issue, Colo. Rev. Stat. § 39–21–112(3.5), because this lawsuit is intended to create the very kind of premature federal court interference with the operation of the Colorado use tax collection system that the TIA was designed to prevent. To assist the Court in understanding the application of the TIA to this case, amici will (i) place the reporting requirements mandated by the Colorado Statute in the broader context of tax administration and (ii) explain the potential interaction between a decision on the TIA issue in this case and the underlying dispute concerning the dormant Commerce Clause.

Third-party reporting of tax information is a ubiquitous and longstanding feature of modern tax systems. When tax authorities rely on taxpayers to self-report their taxable activities, compliance rates for the collection of any tax is low. A common and successful response to this problem is to rely on third-party reporting. At the federal level, there is, for instance, the use of Form 1099 to report payments that one makes to a non-employee, as well as interest and dividends – all of which might well escape taxation if the IRS did not obtain the information from third parties.

Colorado faced – and faces – a voluntary compliance problem with the collection of its use tax. The use tax is a complement to the sales tax; in-state vendors collect and remit the sales tax, while in-state consumers are responsible for remitting the use tax on purchases made from out-of-state vendors that do not collect the sales tax. The use tax has exactly the same rate and base as the sales tax. Yet the use tax is collected much less often because in-state consumers do not generally remit it. The Colorado businesses that must collect the sales tax are therefore at a competitive disadvantage compared to out-of-state companies that do not have to collect use tax because consumers treat purchases from these out-of-state sellers as "sales tax free."

If this lawsuit succeeds, the out-of-state sellers that already do not have to collect the use tax will also not have to report the necessary information that Colorado needs to bolster its collection efforts. The harm to the State is compounded because the local businesses that are hurt by this tax gap are the source of other revenue for the State. For instance, the employees of in-state businesses pay state income taxes and make purchases subject to the sales tax. Furthermore, a thriving local economy, which is protected by an enforceable use tax, provides other more intangible benefits to the state. Colorado therefore adopted a third-party reporting solution, like Form 1099, to address its use tax collection gap.

Before waiting to see whether and how Colorado's very traditional and widely employed solution to a typical tax compliance problem worked when implemented, petitioner went to federal court to enjoin the law's application. This is precisely what the TIA forbids: the petitioner is in effect urging the federal courts to interfere with the collection of Colorado's use tax. No one doubts that, if petitioner sought a federal court order directly enjoining the operation of Colorado's use tax, that remedy would be barred by the TIA. Here, petitioner seeks to achieve that end indirectly by seeking to enjoin the collection of the information that Colorado needs to make the use tax effective. And if petitioner succeeds on the merits, there will still be a use tax, but it will continue to be as ineffective as if it were removed from the statute books entirely with respect to a large, and growing, segment of the economy.

Amici thus agree with respondent that the text of the TIA, along with its legislative history, this Court's precedent, and the larger interests of comity all indicate that the Tenth Circuit was correct. As a matter of federalism, it is not the place of federal courts to undermine an integral element of state tax systems. Amici observe, however, that even a narrow ruling on the scope of the TIA in this Court could have an unexpected - and we would argue undesirable – impact on the federalism concerns that we think should decide this case. This is because any interpretation of the Colorado Statute for purposes of the TIA made by this Court might be erroneously construed as carrying over to interpreting the Statute for purposes of the dormant Commerce Clause. We note that two lower courts that have addressed the merits of this case are divided as to whether the Colorado Statute is a "tax" or a "regulation" and whether that classification should matter. The federal district court believed that the Colorado Statute was sufficiently similar to a tax to merit analysis under the strict nexus test of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). The Colorado state court has since disagreed and did not apply the *Quill* test to the Colorado Statute, though it then proceeded to apply a stringent test for discrimination to the Statute and issued a preliminary injunction barring its application.

We think it likely and reasonable for the courts below to look to this Court's decision on the TIA for guidance as to what test to apply under the dormant Commerce Clause. However, amici fear that a decision that held that Colorado's reporting requirement is integral to Colorado's "tax collection" for purposes of the TIA will exert a gravitational pull on the lower courts, encouraging them to continue to apply *Quill's* physical presence test to the Colorado Statute. The *Quill* test is an especially strict test under the dormant Commerce Clause, and one arguably meant only for "taxes." Thus, a victory for sensible state tax administration and federalism in this Court could be transmuted into a defeat for those principles below. Amici believe that *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), teaches that an answer on the TIA does *not* compel an answer concerning the dormant Commerce Clause. We call this issue to the Court's attention so that the Court is aware of how a decision on the TIA issue might be used – or misused – when the case reaches the merits, either in the state or federal court system. [2]

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[2] We note that the petitioner has already implicitly argued that the TIA does not compel an answer to the dormant Commerce Clause question. In the courts below, the petitioner argued for expansion of the notion of a "tax" in order to spur application of the *Quill* rule, but before this Court petitioner now argues for a narrow interpretation of a "tax," one that would prevent application of the TIA. *See, e.g.*, Brief for Appellee at 51, *Direct Marketing Ass'n v. Brohl*, 735 F. 3d 904 (CA10 2013), 2012 WL 3886467 ("The same principles relied upon by the Court in *Quill* prohibit Colorado from subjecting remote sellers to the notice and reporting obligations of the [Colorado] Act. The parallel between this case and *Quill* is direct . . ."). Amici believe

ARGUMENT

I. Third-Party Reporting Requirements, Such as Those Instituted by Colorado, Are Integral to Tax Collection and Are Shielded from Federal Court Interference by the Tax Injunction Act.

The Colorado Statute is unexceptional in adopting an information reporting solution to solve the problem of a low rate of voluntary tax compliance. Because the Statute's operation is integral to the functioning of Colorado's sales and use tax system, its operation is shielded by the TIA.

A. Background on the Sales and Use Tax

Colorado imposes a sales tax of 2.9% on the sale of tangible personal property in Colorado. Colo. Rev. Stat. § 39-26-104(1)(a), -106(1)(a)(II). The formal liability for this tax is placed on the retailers, but retailers must pass the tax on to their purchasers. *See, e.g.*, Colo. Rev. Stat. § 39-26-108 (retailers may not advertise that they are absorbing the tax). Colorado imposes a complementary use tax at the same rate for the use of tangible personal property acquired out of

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that petitioner is incorrect on both the TIA and dormant Commerce Clause. Among other reasons, this is because both of petitioner's positions undermine state tax systems. A narrower interpretation of the TIA means more litigation in federal courts about matters integral to tax administration, even before provisions have been put into operation. An interpretation of *Quill* that it applies to information reporting systems means, in the context of the internet economy, that more transactions will slip out of the state sales and use tax base, thereby hamstringing a major source of revenue and creating unfair competition for in-state retailers. For further discussion of these issues, see Part II *infra*.

state, for which no Colorado sales tax has been collected; the legal liability for the use tax is placed on the purchasers. Colo. Rev. Stat. § 39–26–202(1)(b), –204(1). Operating together, the two complementary liabilities impose a single tax on the purchase and use of tangible personal property. If a purchase is made in-state, then the retailer is liable for the collection and remittance of the tax. If a purchase is made out-of-state, then only the purchaser is liable for the tax and its remittance. If not for the use tax, state sales taxes would systematically encourage state residents to make their purchases out of state. This Court long ago found that the use tax is constitutional as a means of protecting a state's sales tax base, as well as in-state businesses. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 581 (1937).[3]

States have looked to vendors to remit the sales tax since the advent of the sales tax during the Great Depression.[4] It is simply too difficult to have individuals keep track of all of their purchases and, without some method of checking compliance, it is very unlikely that individuals would report their purchases in full.

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[3] Justice Cardozo's understanding of the sales-use tax system is worth quoting in full:

> The practical effect of a system thus conditioned is readily perceived. One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales.

Henneford v. Silas Mason Co., 300 U.S. 577, 581 (1937).

[4] The use tax was first developed by California and Washington in 1935 and "[s]ince the early 1960s, all states

The weakness of relying on voluntary compliance is a problem for all taxes, federal and state, income and sales. The 1943 imposition of withholding of taxes on wages at the federal level is another example of a similar solution to the same basic problem.[5] Rather than wholly rely on each individual employee to remit their income taxes correctly at the end of the year, the federal government chose to put much of the burden of withholding and paying the taxes on the smaller number of employers who are also more likely to have greater bookkeeping capacity. 26 U.S.C. § 3402 (current requirement). When there are no wages to withhold – for instance when a dividend is being paid - the federal government instead relies on information reporting.[6]

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imposing sales taxes also have imposed use taxes." John F. Due & John L. Mikesell, Sales Taxation: State and Local Structure and Administration 245 (2d Ed. 1994).

[5] Current Tax Payment Act of 1943, Pub. L. No. 78-68, ch. 120, sec. 2(a), §§ 1621-22, 57 Stat. 126, 126-35.

[6] 26 U.S.C. § 6041(a) ("All persons engaged in a trade or business and making payment in the course of such trade or business to another person . . . of $600 or more in any taxable year . . . shall render a true and accurate return to the Secretary, under such regulations and in such form and manner and to such extent as may be prescribed by the Secretary, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment.").

States with income taxes also generally require withholding, including on income earned by residents of other states.[7] Indeed, withholding of the income of non-residents preceded withholding more broadly because of the particular challenge states perceived in collecting the tax due from non-residents.[8] This Court long ago accepted such a differential scheme of tax administration as constitutional. *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 76 (1920) ("The contention that an unconstitutional discrimination against noncitizens arises out of the [challenged] provision . . . [which] confin[es] the withholding at source to the income of nonresidents is unsubstantial. That provision does not in any wise increase the burden of the tax upon nonresidents, but merely recognizes the fact that as to them the state imposes no personal liability, and hence adopts a convenient substitute for it.").

B. Obligations of Colorado Retailers

Colorado retailers have a legal obligation to collect the sales tax and to remit it to the state on a particular schedule, usually on a monthly basis. Colo. Rev. Stat.

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[7] *See, e.g.*, Cal. Rev. & Tax Code § 18662 (authorizing withholding); *see also* RIA, All States Tax Guide P 227 (2014) (Table: Wage and Other Withholding and Information Returns) (Most states have some withholding and/or information reporting requirement).

[8] States also rely on information sharing with the federal government, which, as just noted, requires extensive information reporting. *See, e.g.*, Otto G. Stolz & George A. Purdy, *Federal Collection of State Individual Income Taxes*, 1977 Duke L.J. 59, 71 (1977).

§ 39-26-105(1)(b)(I). Colorado retailers must maintain records of their sales for a period of three years. Colo. Rev. Stat. § 39-26-116. Colorado retailers hold sales tax revenue in trust, and there is a lien on the property of the retailers in connection with the sales tax. Colo. Rev. Stat. §§ 39-26-117, - 118. It is a felony for a retailer not to file a return with the State or to file a fraudulent return; significant monetary penalties can also apply. Colo. Rev. Stat. § 39-26-118, -120-21.[9]

C. Use Tax Collection

Tax compliance increases based on the amount of third-party reporting required. At the federal level, the latest analysis from the GAO puts the non-compliance level at 56% when there is little or no third-party reporting, while the non-compliance rate for ordinary wages and salaries is only 1%. U.S. Gov't Accountability Office, GAO-12-651T, *Tax Gap: Sources Of Noncompliance And Strategies To Reduce It*, at 6 (2012). When it comes to use tax compliance by individual consumers, the percentage is far lower than the reported percentages for complying with the federal income tax. For example, California has implemented a large number of measures intended to spur voluntary compliance, including providing lookup tables and a use tax line on its personal income tax form. California State Board of Equalization, *Addressing the Tax Gap*, http://www.boe.ca.gov/news/tax_gap.htm (detailing California efforts); Daily Tax Report (BNA), *States See Little Revenue From Online Sales Tax Laws, Keep Pressure On Congress*, Jan. 6, 2014 at J-1; *see also* Nina Manzi, Minnesota House of Representatives Research Department, *Policy Brief: Use Tax Collection on Income Tax Returns In Other States* (2012) (survey of state efforts). Nevertheless, in 2012 California estimated that it only collected the use tax on about 4% of sales from non-collecting out-of-state vendors on which the use tax was due. California State Board of Equalization, *Revenue Estimate: Electronic Commerce and Mail Order Sales*, Rev. 8/13, at 7 tbl.3 (2013) (comparing estimate of total remote sales with estimate of total sales on which use tax was paid).

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[9] For a more complete list of the obligations of in-state retailers, see Corrected Brief of Multistate Tax Commission as Amicus Curiae, DMA v. Brohl, 735 F. 3d 904 (CA10 2013), 2012 WL 3886451 (Addendum). Colorado retailers are entitled to retain a small amount of the sales tax they collect to compensate them for their administrative burden. Colo. Rev. Stat. § 39-26-105(1)(c)(I)(A).

The most direct solution to the problem of collecting the use tax is to require out-of-state vendors to collect the tax just like in-state vendors. Indeed, such vendors are required to collect the use tax, but only if they have physical presence in the state mandating collection.

The physical presence requirement emerges from this Court's decision in *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967), as re-affirmed, though importantly modified, by this Court in *Quill v. North Dakota*. *Quill* holds that it is a violation of the dormant Commerce Clause for a state to impose a use tax collection obligation on any retailer that does not have a physical presence in the state. *Quill*, 504 U.S. at 313-19. Therefore, under *Quill*, Colorado cannot impose the obligation to collect the use tax on vendors that have no physical presence in Colorado.

D. Implication of the Use Tax Collection Gap

Before the explosion of electronic commerce, the use tax collection gap was a much less serious problem, although mail-order companies like LL Bean – and Quill itself - have long been a problem for state use tax collection. The latest estimates that amici are aware of projected the total use tax collection gap facing the states collectively at over $11 billion in 2012, with the revenue lost to Colorado estimated at about $170 million. Donald Bruce et al., *State and Local Sales Tax Revenue Losses From E-Commerce*, 52 State Tax Notes 537, 545 (May 18, 2009). This collection gap is only likely to grow. *See generally id.* And this gap is more than a revenue problem because this particular tax gap directly favors out-of-state retailers at the expense of in-state retailers who must collect the sales tax and are therefore placed at a competitive disadvantage.

Recent studies confirm that a sizeable number of online consumers actively seek to avoid paying the use tax, which explains why sellers resist collecting it - or, as in this case - even reporting the taxable transaction to the purchaser or to the state tax officials where the purchaser resides. *See* Liran Einav et al., *Sales Taxes and Internet Commerce*, 104 American Economic Review 1, 4 (2014) ("We estimate that on average, the application of a 10 percent sales tax reduces purchases by 15 percent among [E-Bay] buyers who have clicked on an item."); Brian Baugh et al., *The "Amazon Tax": Empirical Evidence From Amazon And Main Street Retailers* (Nat'l. Bureau of Econ. Research, Working Paper 20052, 2014) at *3. (studying how consumers reacted in the small number of states in which Amazon.com has begun to collect the use tax and, among other things, finding "a 19.8% increase in purchases at the online operations of competing retailers [that do not collect the use tax]. . ., [and] a 2.0% increase in local brick-and-mortar expenditures. . . .").[10] These studies suggest the large scale of the losses suffered by in-state businesses as a result of a constitutional rule meant to provide a level playing field for out-of-state businesses.

Amici note that systematically disadvantaging in-state business in this way is inconsistent with the modern dormant Commerce Clause. As Justice Stone put it, "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938). To be sure, the ruling in *Quill* does seem to systematically disadvantage in-state commerce, as the dissent in *Quill* observed. *Quill*, 504 U.S. at 329 ("If the Commerce Clause was intended to put businesses on an even playing field, the majority's rule is hardly a way to achieve that goal.") (White, J., dissenting). Yet the majority in *Quill* never questioned this underlying purpose of the dormant Commerce Clause, *id.* at 309, and cited *Western Live Stock* favorably. *Id.*[11] Rather, and also following *Western Live Stock*, the majority in *Quill* held that collection of the use tax placed too great a burden on retailers who sold remotely into several states as compared to in-state retailers, in part because of the multiplicity of jurisdictions, with a variety of tax rates, that a seller like Quill would have to satisfy. *See id.* at 313 n.6; *see also Western Live Stock*, 303 U.S. at 255-56 ("The vice characteristic of those [tax measures] which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable in point of substance, of being imposed . . with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce.") (internal citations omitted).

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[10] Even more dramatically, these researchers found that "[w]hen [they] look[ed] at the sales of Amazon Marketplace merchants, who are generally not subject to the Amazon Tax, the large sales (≥$300) of these retailers increase by 60.5% after the tax goes into effect." *See* Baugh et al., *supra.*

[11] *Cf.* Charles A. Trost, Federal Limitations on State and Local Tax § 9:2 (2d ed. 2002) ("[I]t will be seen that, after some

E. Colorado Imposes Third-Party Reporting

In response to the use tax collection gap and its impact on local businesses, Colorado turned to an information reporting solution. Three reports are required by the Colorado Statute. First, a notice must be sent by the seller to the purchaser, with each purchase, that Colorado use tax may be due. Colo. Rev. Stat. § 39–21–112(3.5)(c)(I). Second, an annual notice must be sent to anyone who purchased more than $500 in goods from that retailer during the previous year. Colo. Rev. Stat. § 39–21–112(3.5)(d)(I)(A); 1 Colo. Code Regs. § 201–1:39–21–112.3.5(3)(c) (defining "de minimis Colorado purchaser"). Third, an annual notice must be sent to

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years of judicial peregrinations . . . the Court has now returned to essentially the same approach as that used in *Western Live Stock*.").

the Colorado Department of Revenue identifying all purchases made by Colorado residents and sent into the State that year. Colo. Rev. Stat. § 39–21–112(3.5)(d)(II)(A). A retailer that makes less than $100,000 worth of sales into Colorado does not need to provide any of these notices. 1 Colo. Code Regs. § 201–1:39–21–112.3.5(1)(a)(iii) (definition of a "retailer that does not collect Colorado sales tax."). Monetary penalties apply for non-compliance; the penalties are capped for the first year of the program and may be waived. Colo. Rev. Stat. § 39–21–112(3.5)(c)(II), (d)(III)(A)-(B).

Crucially, the Colorado Statute does not require a retailer to calculate a sales tax rate for the particular geographic area to which the sale was made. There are thousands of overlapping jurisdictions in the United States with the power to impose the use tax, and it was, at least in part, because of the difficulty in computing individual tax liability that this Court decided to retain a bright-line physical presence test in *Quill* and thus to leave the problem of balancing interests to legislatures, particularly to Congress. Congress is better suited to balance the interests of states in collecting the use tax with the interests of interstate retailers who could be overburdened. *Quill*, 504 U.S. at 313 n.6, 318. This case does not require the same balancing, as Colorado does not require any out of state retailer to collect or even calculate any tax. As a result, the burdens imposed are minimal. The initial transactional notice could easily be satisfied by adding a short statement on the invoice that is sent to every purchaser with the product. As for the annual notice, virtually every business, especially every larger business, keeps track of its customers, especially those customers who purchase over $500 in merchandise. Accordingly, automatically notifying these customers (and the Department of Revenue) is a minor burden, and surely much less a burden than remitting tax revenue to one, let alone several thousand, jurisdictions.[12]

In sum, the Colorado Statute is a modest requirement on one party to a taxable transaction to report information, which it typically collects in any event, to the taxing authorities. This obligation is only imposed on relatively large businesses, and failure to make the report subjects the obligated business to moderate financial penalties of the type generally levied for failure to comply with a tax measure and does not subject that party to collateral consequences outside of the tax system, such as the loss of a valuable license. If this Court holds, as it should, that the Statute is shielded from federal court interference by the TIA, then this holding would not threaten to unleash the parade of horribles portended by petitioner and its amici. This is because the Statute requires the provision of readily available and narrow tax information, by a party to a taxable transaction, to tax authorities, for the purpose of enforcing that very same tax. Thus this provision is readily distinguishable from the scenarios sketched by the petitioner and its amici. *See, e.g.*, Direct Marketing Association Br., pp. 52-53 (example of common carriers being required to inspect packages.); Institute for Professionals in Taxation Br., pp. 16-20 (example of withholding licenses to ensure compliance). To be sure, there are limits to the protection offered by the TIA, and, as state laws approach – and go beyond – these limits, there are hard cases. Perhaps some of the scenarios feared by the petitioner and its amici represent such cases. The Colorado Statute, however, does not present a hard case.

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[12] Amici observe that the challenge of properly calculating and remitting use tax revenues to thousands of jurisdictions has declined precipitously since *Quill* was decided because of major advances in computers and the ability to make payments online. Indeed, many states have, among themselves, decided it would be economical to provide the necessary software to retailers for free. *See, e.g.*, Streamlined Sales and Use Tax Agreement § 305(E) ("Each member state that has local jurisdictions that levy a sales or use tax shall . [p]rovide and maintain a database of all sales and use tax rates for all of the jurisdictions levying taxes within the state."). A bill has passed the United States Senate that would allow states to require collection of the use tax if, among other things, the state made such software available for free. Marketplace Fairness Act of 2013, S. 743, 113th Cong. § 2(b)(2)(D)(ii)(2013). In anticipation of the passage of such a bill, Colorado passed a statute instructing the Department of Revenue to make such a database available. Colo. Rev. Stat. § 39-26-105.3(7)-(10).

F. Additional Context on Third-Party Reporting

The federal government recently (2010) adopted a third-party reporting regime to meet a challenge analogous to that facing Colorado. Specifically, non-US banks must report U.S. account holder information to the U.S. government in order to avoid U.S. withholding taxes. 26 U.S.C. §§ 1471-74 (Foreign Account Tax Compliance Act). The United States faces practical obstacles in getting U.S. investors with non-U.S. bank accounts to properly report and pay their taxes. Among other obstacles, the United States cannot, of course, compel foreign governments to collect U.S. taxes, just as Colorado cannot compel out-of-state retailers to collect the use tax. Rather than continue to rely on the ineffective expedient of voluntary reporting, the federal government, like Colorado, has turned to third-party reporting.

Third-party reporting is at the heart of all modern tax systems, including the tax system most commonly found in the rest of the world: the Value Added Tax (VAT), especially in its most common form, which uses the credit-invoice method. Sijbren Cnossen, *A VAT Primer for Lawyers, Economists, and Accountants*, 124 Tax Notes 687, 692 (Aug. 17, 2009) (150 countries have a VAT, including all other members of the OECD). A credit-invoice VAT relies on third-party reporting in the following way: at each sale of a good along the chain of production, the business selling the good is obligated to pay the full tax due. However, each business is also entitled to a credit for the tax remitted by the business that handled the good earlier in the value chain; it is the difference between the value of the input and the output that constitutes the "value added," which is the base of the tax. *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 362 (1991) ("[T]he sale price of a product is the total of all value added by each step of the production process to that point.") It therefore makes sense for each business in the chain to make certain that its suppliers paid the tax properly, lest their own credit be placed in jeopardy. There is evidence that this third-party reporting system spurs compliance. *See, e.g.*, Dina Pomeranz, *No Taxation Without Information: Deterrence and Self-Enforcement in the Value Added* Tax (Harv. Bus. Sch., Working Paper 13-057, 2013) at 24. ("This paper investigates the effectiveness of the Value Added Tax in facilitating tax enforcement . . . and shows that in line with a growing recent literature, information reporting plays a crucial role for effective taxation.").

Of course, just because third-party reporting is a common and crucial element of tax administration in general does not necessarily mean that it was appropriate – or promising – for Colorado to use it in the use tax context. But here its use is highly appropriate as measured by neutral criteria used to judge such matters. In 2010, one of the leading experts in tax compliance synthesized the information-reporting literature and arrived at six criteria to indicate whether introducing an information reporting regime would be advisable. Leandra Lederman, *Reducing Information Gaps to Reduce the Tax Gap: When is Information Reporting Warranted?*, 78 Fordham L. Rev. 1733 (2010). The Colorado Statute scores highly under each criterion. For instance, the reporting requirement is properly being imposed on a party with greater bookkeeping infrastructure and also on the less numerous party (i.e., retailers versus consumers).[13]

Given the centrality of third-party reporting to tax administration in general, and its aptness for this problem in particular, amici believe that the Tenth Circuit was correct in concluding that enjoining the operation of the Colorado Statute constituted "restrain[ing] the assessment, levy or collection" of Colorado's use tax. 28 U.S.C. § 1341.

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[13] For completeness, the remaining four criteria favoring information reporting are: the revenue loss should be worth the administrative cost, the two parties should have an arms-length relationship, the information collected should be sufficient for enforcement purposes, and there should not be an easy way to avoid the reporting requirement. Lederman, *supra* at 1739-41.

II. How this Court Decides the Question Presented on the TIA May Impact How the Lower Courts Adjudicate the Merits

Whatever this Court decides in this case regarding the TIA, the dispute about the constitutionality of the Colorado Statute will continue. Having lost before the Tenth Circuit on the grounds of the TIA, petitioner asked a Colorado state court to preliminarily enjoin operation of the Colorado Statute. Petitioner was successful there, just as it was before the federal district court. Order Granting Preliminary Injunction, *Direct Marketing Ass'n v. Department of Revenue and Barbara Brohl*, Case No. 13 CV 34855 (District Court for the City and County of Denver) (Feb. 18, 2014); *Direct Marketing Ass'n v. Huber*, 2012 WL 1079175 (D. Colorado) (Mar. 30, 2012).[14] However, the two courts disagreed with one another on how to conduct their analysis, and amici disagree with the analytical rubric utilized by both. Although the merits dispute concerning the dormant Commerce Clause is beyond the question presented, this Court's TIA decision, even if narrowly written, might influence the resolution of the merits because both sides will look to the ruling here to provide guidance for what will be argued in either the state or federal court thereafter.

As this Court observed in the context of suits under Section 1983, "an injunction issued by a state court pursuant to § 1983 is just as disruptive as one entered by a federal court." *Nat'l Private Truck*

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[14] The district court's opinion is included as Appendix B to the Petition for Certiorari. Subsequent cites to this decision will be to Appendix B.

Council, Inc. v. Oklahoma Tax Comm'n, 515 U.S. 582, 591 (1995). Accordingly, this Court, "[g]iven the strong background presumption against interference with state taxation," concluded that "[w]e simply do not read § 1983 to provide for injunctive or declaratory relief against a state tax, either in federal or state court, when an adequate legal remedy exists." *Id.* at 590-91. Here, it is possible that an interpretation of the TIA that protects states' control over their revenue function could, ironically, fortify a procrustean interpretation of what is permissible under the dormant Commerce Clause. Such interpretation could, in turn, inadvertently, undermine state control over its revenue function. *Cf. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007) ("The dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake. . . .").

There are two related issues on which the lower courts are split or confused in connection with the Colorado Statute. First, they are uncertain on whether to apply the physical presence test of *Quill* to this Statute and, second, whether this Court applies a stricter test under the dormant Commerce Clause for tax statutes than it does for regulatory statutes unrelated to taxation. However this Court decides the breadth of the TIA, the lower courts will look to this Court's decision for guidance as to how to resolve these merits issues. In amici's view, a decision as to the scope of the TIA should not compel lower courts to apply any particular test to the Colorado Statute because the TIA question is a matter of statutory interpretation, informed by comity concerns, and the merits question is a matter of constitutional interpretation, motivated by concern with maintaining a national free market. Nonetheless, the relevant factors in both inquiries do overlap to some degree. For instance, if this Court were to find that the information reporting requirement at issue in this case is so entwined with Colorado's use tax such that it should be shielded by the TIA, then perhaps the special concerns with the use tax that animated this Court's decision in *Quill* should also apply to the information reporting requirement. Thus the lower courts will be watching this TIA ruling for signs of how the merits question should be resolved.

And, in fact, the federal district court and the Colorado state court have already split on the applicability of the *Quill* rule to the Colorado Statute. Compare District Court Order at Pet. App. B-19 ("I conclude that the burdens imposed by the [Colorado] Act and the Regulations are inextricably related in kind and purpose to the burdens condemned in *Quill*.") with State Court Order at *28 ("I think it likely that *Quill* is limited to taxation, and therefore will be found on the merits to have no application to this case.").

Quill actually has three holdings that are potentially relevant for the Colorado Statute. First, *Quill* held that imposing a collection requirement on out-of-state retailers did not violate the Due Process Clause of the 14th Amendment so long as there was purposeful availment and minimal contacts between the taxpayer and the state. *Quill*, 504 U.S. at 308. Petitioner has not contended – nor could it – that the Colorado Statute facially violates the Due Process rights of out-of-state retailers.

Second, until *Quill*, there was no formal distinction between the nexus analysis required under the Due Process Clause and the nexus analysis required under the dormant Commerce Clause. *Quill* established that the "substantial nexus" test under the dormant Commerce Clause was more demanding than the test under the Due Process Clause. *Quill*, 504 U.S. at 313 ("[T]he 'substantial nexus' requirement is not, like due process' 'minimum contacts' requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce. Accordingly, contrary to the State's suggestion, a corporation may have the 'minimum contacts' with a taxing State as required by the Due Process Clause, and yet lack the 'substantial nexus' with that State as required by the Commerce Clause."). Because *Quill* arose in an analysis of prong one of the four-part test for taxes established in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), this more demanding nexus requirement, so far as amici know, has only been used to analyze measures requiring the collection of taxes by out-of-state sellers. *See, e.g.*, *Ferndale Labs., Inc. v. Cavendish*, 79 F.3d 488, 494 (CA6 1996). It is therefore unclear if this heightened nexus requirement should be applied to the Colorado Statute which does not require the collection or calculation of any tax, but does impose a modest reporting requirement.

Quill's third holding is that, as to out-of-state use tax collection obligations, the substantial nexus requirement of the *Complete Auto* Test is a bright-line rule that only retailers with a physical presence in a state can be compelled to collect that state's use tax. *Quill*, 504 U.S. at 313-19. The district court found that this holding applied to the Colorado Statute, even though it does not require the collection or remission of any tax and, accordingly, ruled for petitioner on this ground. District Court Order at Pet.App. B-17-20.

The Colorado state court did not agree that the *Quill* rule applies so broadly. State Court Order at *16-22.

There is a second way in which a TIA ruling may impact the underlying merits issue and, again, this potential spillover is caused by the fact that, in deciding this case, this Court must decide if the Colorado information requirements are sufficiently implicated in the Colorado tax system to merit protection under the TIA. Many commentators believe that this Court subjects taxes and regulations to two different analyses in a manner unrelated to *Quill*, and if these commentators are correct, then the lower courts should subject the Colorado Statute to a different test depending on whether it more resembles a tax or a regulation. *See, e.g.*, Dan T. Coenen, *Where United Haulers Might Take Us: The Future of the State-Self-Promotion Exception to the Dormant Commerce Clause Rule*, 95 Iowa L. Rev. 541, 599 (2010); Edward A. Zelinsky, *The False Modesty of Department of Revenue v. Davis: Disrupting the Dormant Commerce Clause Through the Traditional Public Function Doctrine*, 29 Virginia Tax Review 407, 441 (2010).

As a general matter, and certainly in the context of regulations, this Court has allowed even a facially discriminatory state law to survive dormant Commerce Clause scrutiny if the state could demonstrate that the law "serves a legitimate local purpose and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (internal quotation marks omitted). *Maine v. Taylor* is the leading example of a case where a facially discriminatory regulation was upheld because a state made this showing. In that case, Maine imposed a ban on the importation of live baitfish; the district court upheld the ban in part because it "concluded that less discriminatory means of protecting against the[] [biological] threats [posed by the fish] were currently unavailable, and that, in particular, testing procedures for baitfish parasites had not yet been devised." *Id.* at 143. This Court upheld the decision of the district court over a dissent that would have required the State to demonstrate its lack of alternatives with "far greater specificity." *Id.* at 153 (Stevens J., dissenting).

In contrast to *Maine v. Taylor*, many commentators believe that, in the case of taxes, states are not given the chance to make this exculpatory showing. In other words, once a state tax law is shown to be discriminatory, then it is unconstitutional without regard to its larger context. *See* Zelinsky, *supra* ("In the wake of *Complete Auto*, the Court has generally invalidated discriminatory state taxes without affording the taxing states the opportunity to defend their respective tax laws as necessary to further legitimate public purposes."). That is, in the case of taxes, a state would not have the chance to justify its taxing scheme as Maine did for its regulation.

The two trial courts below in this case did not explicitly reject the possibility that a discriminatory tax statute might be upheld because there was no reasonable alternative. Rather, both courts cursorily rejected the arguments made by the State to justify its reporting law and proceeded to grant petitioner an injunction despite the importance of information reporting and the holding of *Maine v. Taylor*. District Court Order at Pet. App. B-15; State Court Order at 24 ("I will not at this stage discuss in any detail the facts Defendants have put forth to show there are no reasonable non-discriminatory alternatives, except to say I think it unlikely, on this record, that Defendants will be able to meet this almost impossible burden."). Amici believe that such a cursory application of the test for facial discrimination is tantamount to not giving the State a chance to justify its statute at all, assuming *arguendo* that there is a constitutionally relevant difference in treatment. Therefore, these analyses run counter to the holding of *Maine v. Taylor* and cannot be sustained.[15]

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[15] The authors of the leading treatise on state and local taxation found the federal district court's decision problematic for similar reasons to those advanced by amici:

> Our concern with the [district] court's discrimination analysis is that it proves too much, suggesting that any differential treatment in tax administration between in-state and out-of-state businesses gives rise to a substantial likelihood of prevailing on a Commerce Clause discrimination claim. Long ago, for example, the Supreme Court sanctioned—at least in the context of the Privileges and Immunities Clause—differential treatment of in-state and out-of-state taxpayers, when there was discrimination in the substantive tax burden and the measures related to enforcement practicalities.

Hellerstein, Hellerstein & Swain, State Taxation ¶ 19.02[7][b] (3d ed., updated through 2014) (citing *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920)). In the view of amici, the Colorado state court's analysis is similarly over-broad. *See* State Court Order at *23-24; *cf. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007) (citing *General Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997)("Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities.").

Amici do not believe that there should be an unforgiving rule for evaluating the alleged discriminatory nature of taxes – or any other state action – in part because it does not show due respect to the states as sovereigns. Although this issue is not before the Court, amici bring it to the Court's attention so that the Court understands that its ruling on the TIA might make it more likely that a more unforgiving test will be applied to the Colorado Statute.

More generally, amici contend that labels on the nature of the statutory authority should not matter for constitutional analysis and that there should be only one test for discrimination under the dormant Commerce Clause. There is no doubt that taxes and regulations can serve different ends and that, furthermore, there may be distinctions based on those differences under the TIA. Nevertheless, taxes and regulations are often policy substitutes. Crucially, both taxes and regulations can be used to encourage or discourage behavior. Furthermore, regulations can be used to raise revenue indirectly and even to redistribute wealth.[16] The hallmark of modern dormant Commerce Clause jurisprudence is a commitment to pragmatism[17] and therefore we do not think that the label should matter in most, if not virtually all, cases.

This Court's decision in *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), is a particularly important application of this commitment to substance over form when it comes to constitutional analysis. In *NFIB v. Sebelius*, the label that Congress used in a statute – namely the individual insurance "mandate" – was respected when the question before the Court was whether another statute passed by Congress – the Anti-Injunction Act, 26 U.S.C. § 7421(a) [AIA] – applied or not. *Id.* at 2583 ("The Anti–Injunction Act and the Affordable Care Act [ACA], however, are creatures of Congress's own creation. How they relate to each other is up to Congress, and the best evidence of Congress's intent is the statutory text."). Because Congress could just re-write the AIA to change its scope, it could also specifically craft a provision in another statute, the ACA, in a manner that avoided application of the AIA. However, despite its non-tax label and despite honoring that label for purposes of the AIA, the Court found this same mandate was a proper exercise of Congress' taxing power. *See id.* at 2594-98. For purposes of constitutional analysis, this Court did not look to labels, but to substance. *Id.* [18]

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[16] Richard A. Posner, *Taxation as Regulation*, 2 Bell J. Econ. and Mgmt. Sci. 22 (1971).

[17] *See, e.g., Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 287-88 (1977) (rejecting importance of labels).

NFIB v. Sebelius therefore instructs the lower courts not to assume that a tax for purposes of the TIA is a tax for constitutional purposes. Nevertheless, a decision by this Court that held, as we believe it should, that the Colorado Statute is central to tax administration and thus is shielded by the TIA, could be read to suggest that this Court also agrees that the Colorado Statute should be analyzed as a "tax" for purposes of the dormant Commerce Clause. Amici believe that there are specific reasons why such a suggestion is not correct – or, at least should not be assumed to be so by the lower courts. Most fundamentally, the TIA and the dormant Commerce Clause serve different, not always complementary, purposes. The TIA, as enacted by Congress, protects a core element of state sovereignty from the interference of federal courts. The dormant Commerce Clause, as developed by this Court, preserves a common national marketplace, which is ultimately to the advantage of all of the participants in a federal system, even if, on occasion, individual state actors object to particular applications. Thus, a special tax on imports into a state would be protected from federal injunction by the TIA, but would almost certainly fail as a violation of the dormant Commerce Clause. Or, to take another scenario, a state regulation that facially discriminated against interstate commerce would not fall within the ambit of the TIA's protection, but would likely fail dormant Commerce Clause analysis. Here, amici believe, we have the converse case: the Colorado Statute merits protection under the TIA because it is essential to Colorado's tax system, but, because it does not undermine the national marketplace, it also does not fail dormant Commerce Clause analysis.

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[18] Amici note that the special reasoning that indicated the label mattered for purposes of the AIA do not apply to the TIA. This is because the TIA, unlike the AIA, is aimed at protecting the revenue function of a *different* sovereign, namely the states.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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AMICUS
CURIAE
BRIEF

No. 13-1032

In the

Supreme Court of the United States

◆

DIRECT MARKETING ASSOCIATION,
Petitioner,

v.

BARBARA BROHL,
IN HER CAPACITY AS EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF REVENUE,
Respondent.

◆

On Writ of Certiorari to the
Tenth Circuit Court of Appeals

◆

BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF RESPONDENT

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BRIEF OF MULTISTATE TAX COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Multistate Tax Commission ("the Commission") respectfully submits this brief in support of the Respondent, Barbara Brohl, in her capacity as Executive Director of the Colorado Department of Revenue, urging this Court to uphold the decision of the Tenth Circuit Court of Appeals.[1]

The issue before the court is whether the federal Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, bars this suit from being heard in the federal courts. The Commission urges the Court to affirm the Tenth Circuit's ruling on the grounds that the language of the TIA, properly read, reaches the circumstances in this case, and a ruling to the contrary would impose harmful consequences on state tax administration and enforcement. In addition, principles of comity compel the conclusion that the federal courts should not interfere with legitimate state efforts to impose information reporting laws critical to the operation of the states' revenue laws.

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[1] No counsel for any party authored this brief in whole or in part. Only *amicus curiae* Multistate Tax Commission and its member states, through the payment of their membership fees, made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state, other than the State of Colorado. Finally, this brief is filed with the consent of the parties.

The Commission was established by the Multistate Tax Compact, which became effective in 1967. *See United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978)(upholding the validity of the Compact). Today, forty-seven states and the District of Columbia participate in the Commission as compact, sovereignty, or associate members.

The purposes of the Compact are to facilitate proper determination of state and local tax liability of multistate taxpayers, promote uniformity or compatibility in significant components of state tax systems, facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of state tax administration, and avoid duplicative taxation. *Multistate Tax Compact*, Art. I.

The Commission's interest in this case arises from our goal of preserving a critical component of state sovereignty, that is, the ability to have important matters affecting state tax systems and the enforcement and collection of state taxes adjudicated in the state courts.

SUMMARY OF ARGUMENT

The Commission urges this Court to hold that the TIA bars this suit. The TIA removes from the federal courts the jurisdiction to hear cases that would "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law " 28 U.S.C. § 1341. The TIA "serves to minimize the frictions inherent in a federal system of government." *Empress Casino Joliet Corporation v. Balmoral Racing Club, Inc.*, 651 F.3d 722, 725 (7th

Cir. 2011)(holding that the TIA barred a suit by private plaintiffs against a private defendant alleging violations of the federal RICO Act in obtaining tax benefits from the state). The TIA is so important as a protective measure that it has been held to apply even to indirect federal efforts to restrain state tax assessment *Blangeres v. Burlington Northern, Inc.*, 872 F.2d 327, 328 (9th Cir. 1989); *Sipe v. Amerada Hess Corp.*, 689 F.2d 396, 404 (3d Cir. 1982); *California v. Grace Brethren Church*, 457 U.S. 393, 412 (1982). This is because the TIA codifies a long-accepted doctrine of judicial comity which counseled federal courts to refrain from interfering with the fiscal operations of state governments where the federal rights at issue could otherwise be preserved unimpaired. *Boise Artesian & Cold Water Co. v. Boise City*, 213 U.S. 276 (1909).

Different types of taxes rely on different collection systems, which are often particularly suited to the thing or activity being taxed. Property tax liabilities, for example, become a lien against the property and are regularly collected by the sale of that lien to third parties or foreclosure by the government. *See* Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Ind. L.J. 747 (2000). In the case of cigarette taxes, because direct collection of the tax from the consumer would be ineffective, the collection of the tax instead depends upon the requirement that wholesalers purchase tax stamps for placement on each individual package before shipment. Congress recently enacted legislation to aid the states in their collection efforts. *See* The Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111-154, 2010 S 1147, 15 U.S.C. § 376.

The TIA's scope should be interpreted in the context of the applicable state tax systems it was intended to protect, not by reference to terms used in the Internal Revenue Code. Properly interpreted in this context, the TIA would bar jurisdiction in this case. Moreover, principles of comity and federalism support this construction.

Use of third parties to provide essential information for tax reporting, and to collect tax imposed on others, are hardly uncommon mechanisms for enforcement in many tax systems. It may be obvious, but is worth noting, that a third-party collection obligation is never imposed without some kind of corresponding requirement for information reporting; it is hardly useful for a third party to collect the tax unless it also provides information to the taxpayer and the tax authority about the corresponding tax liability and the payment made. Lawmakers could reasonably conclude that failure to impose effective tax collection and reporting requirements on third parties in many situations would be a disservice to taxpayers who voluntarily comply with the law. So, for example, employers are subject to withholding and reporting obligations on wage income under federal income tax laws. 26 U.S.C. § 3401(a).

Where withholding or collection of the tax is not feasible, research has shown that imposing an information-reporting obligation by itself will still increase tax collection. *See* Internal Revenue Service Tax Gap for Tax Year 2006 – Overview, Jan. 6, 2012, and IR-2012-4 (2012)(estimating the net misreporting percentage, or NMP, defined as the net misreported amount as a ratio of the true amount, is 8% for amounts subject to substantial information reporting but no withholding, as opposed to 56% for income where no withholding or information reporting is required). [2] Again, this type of requirement typically involves information reported by the third party to both the taxpayer and the taxing authority. Where the taxpayer relies on the third-party information to voluntarily comply (that is, to self-assess), this information-reporting obligation is not merely helpful, but is *essential* for tax collection. For example, partnerships, while exempt from tax, must provide information to partners for computation of their own tax on their share of partnership income. 26 U.S.C. §§ 701-704 and § 6063. Corporations electing to be treated as exempt "Subchapter S Corporations" have a similar reporting duty which enables their shareholders to report and pay tax on "pass-through" income of the corporation. 26 C.F.R. § 1.6012-2(h).

While such third party tax collection and reporting mechanisms are common and sometimes essential to the effective enforcement of other taxes, general consumption taxes stand out in terms of their dependence upon third-party sellers to collect and report the tax. No government that imposes a general consumption tax has discovered a way to dispense with this mechanism.[3] Consumption taxes, by their nature, are imposed on the day-to-day purchases by individuals, virtually none of whom maintain detailed records of those purchases, and many of whom (*e.g.*, minors) could hardly be required to do so. Without this information, compliance and enforcement would be nearly impossible. But sellers do maintain detailed records of sales for all sorts of reasons, including federal income tax compliance.

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[2] http://www.irs.gov/uac/The-Tax-Gap (last visited Oct. 22, 2-14).

[3] *See* Organisation for Economic Cooperation and Development, Consumption Tax Aspects of Electronic Commerce—A Report from Working Party No. 9 on Consumption Taxes to the Committee on Fiscal Affairs, February 2001, explaining the

The Respondents do not suggest that a general consumption tax would function without this seller-collection and reporting mechanism. It is therefore unremarkable that in this country, where the only general consumption tax is the sales and use tax imposed solely by state and local governments, the states impose collection and reporting obligations on sellers. It should be equally clear that when imposing an information-reporting requirement is an essential element of collecting the tax, to enjoin the imposition of that requirement is to enjoin the collection of the tax.

Colorado has adopted this reporting mechanism to aid in the collection of its sales and use tax impositions. Sellers who are "retailers" and are "doing business" in the state have a statutory tax collection and reporting duty under state law. COLO. REV. STAT. §§ 39-26-102, 39-26-105 and 39-36-204(2). Under this Court's holding in *Quill v. North Dakota*, 504 U.S. 298 (1992), Colorado may not apply this tax

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difficulties with alternatives to seller-collection of consumption taxes imposed on electronic transactions.

collection duty to certain of DMA's members if they lack the requisite "substantial nexus" with the state. *Quill*, 504 U.S. at 313. But the state asserts that it may, consistent with *Quill*, impose information-reporting requirements without the obligation to calculate, charge and pay over the tax. As the circuit court recognized, the information-reporting requirements at issue here are no less an element of the tax collection system. *Direct Marketing Ass'n v. Brohl*, 735 F.3d 904, 912-914 (10th Cir. 2013). Therefore, a case challenging these information-reporting requirements is a case seeking to "enjoin, suspend or restrain collection of any tax under State law," in violation of the TIA's jurisdictional bar.

Not only does the TIA's own language support a conclusion that Congress removed the jurisdiction to hear this suit from the federal courts, but such a ruling will not lead to the slippery slope that DMA fears. Brief of Petitioner at 52-54. It is not necessary for this Court to rule that any suit that may negatively affect tax collection, however indirectly, is barred from federal court. The Commission does not suggest that the TIA would bar a federal suit brought by a plaintiff with only an indirect or incidental connection to a tax assessment, collection or reporting obligation. A ruling in favor of DMA would subject states to suit over a number of common information-reporting requirements that have been deemed to be essential enough to be applied broadly as part of the states' tax collection systems.

Principles of judicial comity and federalism also support upholding the decision of the circuit court. First, while the TIA is similar in structure and effect to the Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421(a), it was motivated not just by the need to efficiently administer taxes and provide for resolution of tax disputes, but also by a respect for the sovereign authority of state governments and the need to protect their tax systems from undue interference if the states are to fulfill their role in our federal system. *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 111 (1981). Second, the role of comity and federalism principles in interpreting the TIA is well established. *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010).

ARGUMENT

I. The TIA Bars Federal Court Jurisdiction to Enjoin Application of the Information-reporting Requirements Imposed Under Colorado Law Upon Retailers Who, But for This Court's Ruling in *Quill*, Would Also be Required to Collect the Tax.

Forty-five states and the District of Columbia currently impose a general sales tax. Jerome R. Hellerstein & Walter Hellerstein, *State Taxation*, ¶ 12.02 (3rd ed. 2001 & Supp. 2014-2). Only Alaska, Delaware, Montana, New Hampshire and Oregon have no state level retail sales and use tax, although several Alaska municipalities rely on local sales taxes. *Id.* Unlike many other countries, the United States lacks a national consumption tax.[4]

The retail sales tax is one of the predominant sources of state and local revenue. According to the US Census Bureau, general sales and gross receipts taxes yielded $255 billion in state revenue in 2013.[5] Colorado received $2.4 billion from general sales and gross receipts taxes in 2013. *Id.* These amounts represent 30.1 percent and 21.5 percent respectively of U.S. total and Colorado state tax collections.[6]

This Court has long recognized that the use tax, a complementary tax to the sales tax imposed on the instate use of taxable goods purchased out of state and collected by the out-of-state seller, is integral to the ability of a state to successfully impose its sales tax.

> The practical effect of [a use tax] system ... is readily perceived. One of its effects must be that retail sellers in [the taxing state] will be helped to compete upon terms of equality

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[4] *See* Tax Reform and Consumption-Based Tax Systems: Hearing Before the H. Comm. on Ways and Means, 112th Cong. (2011) [hereinafter Ways and Means July 26 Hearing] (statement of Prof. Michael J. Graetz, Columbia Law School).

[5] U.S. Census Bureau 2013 Annual Survey of State Government Tax Collections, http://govs015webdev/govs/ftp2/statetax/2013stcreport.pdf (last visited Oct. 22, 2014).

[6] 2013 State Tax Collection by Source, Federation of Tax Administrators, http://www.taxadmin.org/fta/rate/13taxdis.html (last visited Oct. 22, 2014).

> with retail dealers in other states who are exempt from a sales tax or any corresponding burden. Another effect, ... must be to avoid the likelihood of a drain upon the revenues of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales.

Henneford v. Silas Mason Co., Inc., 300 U.S. 577, 581 (1937). *Accord, Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 (1939).

Colorado, like the 44 other states that impose a use tax, finds itself confronted with a dilemma. In order for the tax to be effective, retailers must play a role in the collection of the tax. Setting aside the question of the requisite nexus that a state must have over an out-of-state seller, this Court has long recognized that states may impose a collection and reporting obligation on out-of-state retailers where that collection obligation is integral to the states' ability to enforce the tax. *Silas Mason*, 300 U.S. 577 (1937), *Felt & Tarrant*, 306 U.S. 62 (1939). While this Court has recognized that the states have both the need as well as the authority under the due process clause and the Commerce Clause to impose a tax collection obligation on out-of-state sellers when they sell into the taxing state, *Gen. Trading Co. v. State Tax Comm'n of Iowa*, 322 US 335, 338 (1944)(holding that "to make the distributor the tax collector for the State is a familiar and sanctioned device"), the Court has also found that the dormant Commerce Clause prevents a state from enforcing that collection obligation on a seller that lacks the requisite nexus to the state. *Nat'l Bellas Hess Inc. v. Dep't. of Revenue*, 386 U.S. 753 (1967) and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

The dissenting opinions in both *Bellas Hess* and *Quill* accurately predicted the negative consequences of the holdings in those cases. The dissent in *Bellas Hess* expressed concern that to relieve certain out-of-state sellers from any tax collection obligation would "burden and penalize" competing retailers who would bear that obligation, 386 US 753, 763 (Fortas, J., dissenting). The dissent in *Quill* further expressed concern that the rule in *Bellas Hess* created an "interstate tax shelter." 504 US 298, 329 (White, J., concurring in part and dissenting in part). These concerns are founded on the implicit understanding that vendors play a critical role in collecting the tax, even though the tax itself is imposed on the purchaser, and is based in the recognition that the inability to rely on the vendor for enforcement of the tax likely renders that tax uncollectible.

If the cause for these concerns was not already self-evident, the empirical proof to support them has been established in the intervening years since *Quill*. In 2009, Professors Donald Bruce, William F. Fox and LeAnn Luna estimated that state and local sales and use tax losses as a result of electronic commerce purchases would range from $11.4 billion to $12.65 billion annually, with six-year aggregate losses from $52 to $56.3 billion. D. Bruce, W. Fox & L. Luna, *State and Local Government Sales Tax*

Revenue Losses from Electronic Commerce, 52 St. Tax Notes 537 (2009).[7]

This case involves an attempt by Colorado to address the compliance problem created by the explosive development of so-called "remote" commerce, particularly electronic commerce conducted over the Internet.[8] Unable to compel both a tax collection and an information-reporting obligation on remote sellers (that is, sellers without the requisite nexus under *Quill*), the state instead seeks to require those remote sellers to provide information to their Colorado customers and to the state Department of Revenue regarding purchases that may be subject to tax. COLO. REV. STAT. § 39-21-112(3.5). The members of DMA challenge the state's constitutional authority to require such information. The state does not contend that DMA cannot maintain such a challenge. The state does assert, however, that such a challenge is barred from being heard in the federal district courts pursuant to the TIA.

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[7] The difficulties of cross-border enforcement of consumption taxes are hardly confined to the United States. The Organization for Economic Co-operation and Development, has thoroughly studied the problem of cross-border collection of consumption taxes and has concluded that with respect to consumer transactions, there is no good alternative to seller-collected tax, recommending that governments instead take steps to facilitate simplified approach to seller registration and compliance. OECD, Consumption Tax Aspects of Electronic Commerce—A Report from Working Party No. 9 on Consumption Taxes to the Committee on Fiscal Affairs, February 2001.

[8] Thad Rueter, *E-retail Spending to Increase 62% by 2016*, InternetRetailer (Feb. 27, 2012), http://www.internetretailer.com/2012/02/27/e-retail-spending-increase-45-2016.

The TIA provides that "the district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." *Id.* The TIA bars this action because it is a suit that clearly seeks to enjoin (in fact, has succeeded in enjoining) requirements essential to the collection of tax, and imposed only for that purpose, upon retailers who belong to the general class of persons charged with tax collection duties under state law. Nothing in this Court's decision in *Hibbs v. Winn*, 542 U.S. 88 (2004) or the decisions of the lower courts cited by DMA would support federal jurisdiction in this case. Moreover, a ruling in favor of Colorado will not unduly expand the TIA's jurisdictional bar as DMA claims.

A. The Colorado Information-Reporting Requirements are Within the Authority of the State to Impose and are Essential to Sales and Use Tax Collection.

The Colorado information-reporting requirements are imposed solely for the purpose of aiding tax collection. First, the statute requires non-collecting remote retailers to notify each Colorado purchaser at the time of a sale that, although the retailer does not collect the tax, the purchaser is obligated to self-report Colorado use tax. COLO. REV. STAT. § 39-21-112(3.5)(c)(I) ("Transactional Notice"). Next, the statute requires a non-collecting retailer to send an annual notice to all Colorado customers whose total purchases for the prior calendar year exceeded $500 ("Annual Purchase Summary"). The notice must list the dates and amount of each purchase for the year, and must again inform the purchaser of the obligation to self-report any use tax that is due. COLO. REV. STAT. § 39-21-112(3.5)(d)(I)(A)-(B). Finally, the statute requires the retailer to file an annual report with the Colorado Revenue Department containing the name, billing address, all shipping addresses, and the total amount of purchases of each of its Colorado purchasers. COLO. REV. STAT. § 39-21-112(3.5)(d)(II)(A) ("Customer Information Report").

Colorado's notice and reporting requirements are a reasonable exercise of the state's authority under the due process clause, U.S. Const. amend. XIV. This Court has held that it would be permissible under that clause for a state to impose the obligation to collect its use tax on remote sellers who lack a physical presence in the taxing state, although the state was precluded from doing so under the facts of that case pursuant to the dormant Commerce Clause. *Quill Corp. v. North Dakota,* 504 U.S. 298 (1992). The due process clause would therefore also allow Colorado to impose the more burdensome collection and reporting obligations on the remote retailers that are required by use tax collection, including accounting to the state for the calculation of tax that is due, the payment of any tax refunds to the consumers, and for all applicable exemptions from tax and non-taxable sales for resale. *See* COLO. REV. STAT. § 39-21-110, COLO. REV. STAT. § 39-21-112(1)-(3), COLO. REV. STAT. § 39-21-105, and COLO. REV. STAT. § 39-21-204. This Court has made clear that the due process clause is not violated if the government's inquiry is within the authority of the agency, the agency's demand is not too indefinite and the information sought is reasonably relevant. *U.S. v. Morton Salt Co.,* 338 U.S. 632, 652 (1950). The information-reporting requirements are therefore within the state's regulatory authority.

Colorado's notice and information-reporting requirements reflect the well-recognized fact that information reporting by third parties is the single most effective tool to increase tax compliance. As the IRS notes in a recent "Tax Gap" report, "[r]eporting compliance is highest where parties other than the taxpayer are required to file information reports ..." *Update on Reducing the Federal Tax Gap and Improving Voluntary Compliance* (US Treasury Department, July 8, 2009), Jt. App.at 43. The IRS notes that receipt of a W-2 from an employer "can lead to significant administrative simplification" and reduce the employee's burden by eliminating the need to gather records or perform computations. *Id.* at 43. The IRS recently implemented two third-party reporting requirements that are strikingly similar to the requirements of the Colorado statute. Starting in January 2011, organizations that process credit and debit card payments for merchants must annually report the amount of these payments to the recipient businesses and to the IRS. *Id.* at 44. Also starting in January 2011, brokerage firms must annually report cost basis and holding period information to customers and to the IRS in addition to gross proceeds from securities transactions. *Id.* The IRS states that "[t]hese information reports will make it easier for taxpayers to compute the net amount of gain or loss and will have a significant effect on reducing misreported capital gains." *Id.*

B. The Sellers on Whom the Information-Reporting Requirements are Imposed are Part of the Same Class upon Whom General Tax Collection and Reporting Obligations are Imposed Under State Law.

The TIA bars federal court jurisdiction over claims that would enjoin or restrain "assessment, levy or collection of any tax *under state law* " The language of the TIA does not restrict this jurisdictional bar to suits brought by taxpayers challenging their own taxes. Assuming the information-reporting requirements at issue are contained within the terms "assessment, levy or collection," DMA cannot reasonably contend that this suit does not violate the TIA's jurisdictional bar by seeking an injunction to prevent the enforcement of the requirements.

By its own terms, the TIA requires that "collection" must be understood in the context of the tax system established under state law. In asserting that this action is not barred by the TIA, DMA relies on the meaning of the term "collection" as defined in the Internal Revenue Code ("IRC") and as used in the AIA, thereby eliding the essential difference between the federal taxes governed by the AIA and the state tax issues of use tax collection that are implicated in this case. Brief for Petitioner at 38. Although the TIA is modeled after the AIA, it is inappropriate to apply the IRC definitions to state sales or use taxes because the concept of "collection" has a materially different meaning in the sales and use tax collection context than it does in the IRC.

The definition of "collection" in the IRC refers to the various administrative and judicial methods that the IRS can employ to collect a tax liability from the taxpayer. 26 U.S.C. §6301 *et seq*. While all states have statutory procedures that authorize the revenue department to obtain the recovery of unpaid taxes, in the context of a state sales or use tax, the term "collection" has a broader meaning than it does under the IRC. The sales and use tax is, in the first instance, generally collected not by the state directly from the taxpayer-purchaser, but by the retail seller. Therefore, the term must be understood as referring to the retailer's role in charging, collecting, reporting and paying over the tax from the purchaser, and should not be confined to the ultimate enforcement mechanisms all states employ to recover any unpaid tax liability.

In the TIA, Congress recognized the distinction between federal and state tax procedures by barring the federal courts from enjoining, suspending or restraining "the assessment, levy or collection of any tax *under State law* ....." (*Emphasis added.*) When used in reference to law, the word "under" is synonymous with "pursuant to." *Macmillan Dictionary*, (thesaurus entry for "pursuant to something").[9]

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[9] http://www.macmillandictionary.com/us/thesaurus/american/pursuant#pursuant-to-something_1 (last visited Oct. 6, 2014).

Under the plain meaning of the TIA the term "collection" is to be determined "pursuant to State law." This is entirely sensible. If the TIA is to protect state authority to collect tax against the potential interference of lawsuits in federal court, then it must protect the methods by which the tax in question is actually collected—not just the methods that potential plaintiffs might argue should be protected.

Retailers in Colorado are required to collect and report sales and use tax. COLO. REV. STAT. §§ 39-26-105 and 39-36-204(2). But retailers who do not collect the tax are required, instead, to comply with the information-reporting requirements at issue in this case. COLO. REV. STAT. § 39-21-112(3.5)(c). Colorado sales and use tax statutes define "retailer" as "a person doing business in this state, known to the trade and public as such, and selling to the user or consumer, and not for resale." COLO. REV. STAT. § 39-26-102(8). The term "doing business" is defined as "selling, leasing, or delivering in this state, or any activity in this state in connection with the selling, leasing, or delivering in this state, of tangible personal property by a retail sale" and includes, but is not limited to, "soliciting, either by direct representatives, indirect representatives, manufacturers' agents, or by distribution of catalogues or other advertising, or by use of any communication media, or by use of the newspaper, radio, or television advertising media, or by any other means whatsoever " COLO. REV. STAT. § 39-26-102(3).

DMA's members who assert a claim against the information-reporting requirements are "retailers" and part of the general class upon which a general tax collection and reporting burden is imposed. This Court's decision in *Quill* may prevent the state from imposing this statutory tax collection obligation upon remote retailers, but it does not change the nature of the retailer's role in making taxable sales into the state and their essential connection to tax collection under the state's sales and use tax system.

The use of state law to give specific meaning to the operative terms of the TIA is completely congruent with the intent of the drafters to limit access to the federal courts in cases that challenge state tax procedures. Brief of Petitioner at App. 4-11. Therefore, it is state law and not federal law that determines the operative terms of the TIA. And Colorado law clearly provides that it is the retailer who generally has a duty to collect Colorado use tax. Separately imposing a less-burdensome information-reporting requirement does not separate that requirement from collection.

In sum, the term "collection" in this context refers to the system employed under Colorado law that relies on retailers to obtain the tax from the purchaser, either through both direct collection and reporting, or through the providing of information that will allow enforcement of collection from the purchaser by the state.

C. While DMA Envisions an Attempt by States to Shield Regulatory Rules from Federal Court Review Under the TIA, it Cannot Dispute that the Requirements in this Case Are Essential and Integral to Tax Collection.

The federal courts are capable of discerning between state requirements that are an essential element of tax collection, while not comprising the act of collection itself, and those requirements whose inclusion in the tax code are mere pretext and done to avoid federal court jurisdiction. Colorado did not set out to design a sales and use tax reporting system which would avoid federal court jurisdiction over challenges to those requirements. This Court is capable of drawing clear distinctions between state requirements that are covered by the TIA's jurisdictional bar because they are integral and essential to collection under the given state's tax system, and ones that are not, without resorting to a cramped construction of the act's terms, which would ultimately undermine its purpose.

DMA *amici* also outline a number of examples of tax enforcement tools that they claim are beyond the scope of the TIA's ban but would nevertheless be included if this court were to uphold the circuit court's decision in this case. *See, e.g.*, Brief of *Amicus Curiae* The Institute for Professionals in Taxation at 17-19. Yet the *amici* do not cite some of the more prevalent types of information reporting done by third parties currently under both state and federal law, which are much closer to the requirements at issue here, and which would be subject to federal court challenge if the circuit court's ruling is reversed.

One previously-mentioned example is the requirement that partnerships and Subchapter S corporations prepare information returns that are then used by partners or shareholders to report and pay tax on the income passed through to them. The partnership or "S corporation" is exempt from tax under federal law generally and usually has no withholding or tax collection duty. 26 U.S.C. §§ 701 and 1363. Under state law, partnerships and S corporations may or may not have a duty to withhold tax on income earned by partners and shareholders. Hellerstein, *State Taxation* ¶ 20.06[5][a]. But it should not be the case that where the information-reporting requirement is accompanied by a tax-withholding requirement, the TIA's jurisdictional bar applies, and where it is not, the bar does not apply. In both cases, the information reporting is essential to the ability of the taxpayer to comply and the third party, the tax-exempt entity, is in the class of persons on whom a collection duty might be generally imposed.

Some examples of statutory systems completely dependent on third-party reporting include liquor, tobacco and fuel taxes. For instance, in Arizona, reporting obligations are imposed on both distributors and wholesalers, although only wholesalers generally pay the tax. *See* ARIZ. REV. STAT. ANN. §§ 42-3352, -3353 and -3354. Imposing a reporting obligation on distributors helps to ensure that wholesalers are reporting all taxable sales.

Fuel taxes imposed by states on carriers operating in multiple states are another example of taxes dependent upon third-party reporting. The states have adopted a kind of clearinghouse system in which the taxes are reported and paid to a "base jurisdiction" (a single state in which the carrier operates) and that jurisdiction collects tax on behalf of all states and conducts audits of its own carriers. The states then exchange information about taxes collected from carriers and also exchange reports filed so that the taxes can be credited to the jurisdiction in which the carrier operated. This system is governed by a detailed agreement among the states that defines each state's obligations under the system in which they are collecting, not just their own taxes, but the taxes imposed by other states, and are requiring information returns from carriers so that other states taxes can be properly determined. [10]

What these examples show is that there are instances in which the information-reporting obligation imposed on the third party may not accompany an obligation to directly pay over tax to the state that imposes that tax, but which are still essential to the tax system's ability to operate. Moreover, these examples demonstrate why any definition of the TIA's terms must be flexible enough to accommodate how states actually impose and collect taxes under state law. It is not reasonable to conclude that the only action that the TIA's bar protects is the transfer of funds for a payment of tax liability to the state. The requirements at issue here were imposed for the legitimate purpose of collecting state taxes and were within the state's authority to impose under the due process clause; the Petitioner does not contend otherwise.

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[10] International Fuel Tax Agreement, *Articles of Agreement*, http://www.iftach.org/manuals/2013/AA/Articles%20of%20Agreement%20Complete%20Document%20-%20FINAL%20July%202013.pdf (last visited Oct. 20, 2014)

D. Colorado State Law Provides a "Plain, Speedy and Efficient Remedy" As Required by the TIA.

Colorado allows a "plain, speedy and efficient remedy" by which DMA's members may challenge the constitutionality of the notice and reporting requirements pursuant to remedies "tailor-made for taxpayers." *Hibbs v. Wynn,* 542 U.S. 88, 107. The statute provides for penalties for failure to provide the required notice or reports, which penalties will not be imposed if the retailer shows reasonable cause for the failure to provide the notice or report.[11] The retailer can raise the issue of reasonable cause by requesting a hearing before the state Department of Revenue pursuant to COLO. REV. STAT. § 39-21-103(8)(c) ("The executive director may modify the ...

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[11] COLO. REV. STAT. § 39-21-112(3.5)(c)(II) (failure to provide required notice to purchaser at time of sale subject to five dollar penalty for each such failure); COLO. REV. STAT. § 39-21-112(3.5)(d)(III)(A) (failure to provide annual purchase report to purchaser subject to ten dollar penalty for each such failure); COLO. REV. STAT. §39-21-112(d)(III)(B)(failure to file annual statement with Department of Revenue subject to ten dollar penalty for each purchaser that should have been included in the statement). In each such case, the penalty will not be imposed if the retailer shows reasonable cause for such failure.

penalty ... questioned at the hearing and may approve a refund"). Taxpayers may appeal an adverse decision pursuant to COLO. REV. STAT. § 39-21-105.[12] Alternatively, the taxpayer and the executive director may agree that "a question of law arising under the United States or Colorado constitutions" may proceed directly to the state district court, thereby bypassing the administrative hearing. COLO. REV. STAT. § 39-21-103(4.5).

The "plain, speedy and efficient remedy" requirement is to be interpreted narrowly in order to give effect to the TIA's purpose of imposing "a broad jurisdictional barrier" that "limit[s] drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Arkansas v. Farm Credit Services of Central Arkansas,* 520 U.S. 821, 825 (1997). In view of the purpose of the TIA to drastically limit federal court jurisdiction in state tax cases, this Court can and should read Colorado's "reasonable cause" provisions as providing retailers a remedy to challenge the constitutionality of the statute. Colorado's tax procedures for challenging tax assessments, including the assessment of penalties, provide the taxpayer-specific remedies as required by *Hibbs*. Under those procedures, they may choose to pay the penalty and seek a refund, or to appeal from the assessment of the penalty *ab initio*. Alternatively, if the taxpayer and the Department agree, remote retailers may proceed directly to state court to litigate a constitutional issue. This is all the TIA requires.

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[12] As argued in more detail at 25, infra, DMA's members are taxpayers under Colorado sales and use tax law, although they cannot be compelled to collect Colorado use tax in the absence of nexus.

E. Because the Retailers Represented by DMA are Responsible under State Law for Providing the Means of Collecting Tax from Purchasers, the Cases They Cite do not Support their Position.

Colorado's information-reporting requirements are integral to the assessment and collection of use tax under state law. Contrary to DMA's assertion that its member retailers who lack nexus in the state are merely "outsiders" to the tax system (Brief for Petitioner at 49), those retailers are and have long been members of the general class of retailers that are unquestionably not "outsiders," but are tax collectors as well as taxpayers pursuant to the Colorado use tax law. "'Taxpayer' means any person obligated to account to the executive director of the department of revenue for taxes collected or to be collected under the terms of this article." COLO. REV. STAT. § 39-26-102(17). Under *Bellas Hess* and *Quill*, Colorado may not apply this definition to certain retailers who do not have some physical presence in the state, but that does not change the nature of the retailer's role or its connection to tax collection under the state's sales and use tax system.

It is because retailers are not "outsiders" that this Court's opinion in *Hibbs v. Winn* does not govern this case. *Hibbs* was an Establishment Clause challenge to an Arizona tax credit that provided for contributions made to parochial schools.

The plaintiffs neither claimed an entitlement to the credit nor sought to decrease state tax revenues in any way. Indeed, had they been successful, state tax revenues would have increased. In contrast, DMA seeks to enjoin a requirement essential to tax collection which applies to retailers that fall under the general class of sellers that are tax collectors and taxpayers under Colorado law. If their action is successful, state tax collections will be adversely affected because purchasers will not have information necessary to report the tax and the state will lack the information necessary to identify Colorado consumers who did not pay tax on their purchases.

Similarly, *Florida Bankers Ass'n v. United States Department of Treasury*, ___ F.Supp. 2d______, 2014 WL 114519 (D.C. Cir. 2014) upon which DMA relies, is plainly distinguishable from this case because neither the payer banks nor the foreign depositors were United States "taxpayers" under the interest reporting requirement at issue in that case. The government sought information regarding interest paid to foreign depositors so that it would have information to trade with foreign governments for information regarding interest paid to American depositors overseas. The interest information regarding foreign depositors required by the IRS was extremely attenuated from the government's objective of increasing compliance by American taxpayers with American tax laws. In contrast, Colorado seeks information from out-of-state Colorado taxpayers without which it is virtually impossible for the state to identify Colorado consumers and to increase self-reporting of the use tax.

This case is also distinguishable from *United Parcel Service, Inc. v. Florez-Galarza*, 318 F.3d 323 (1st Cir. 2003). As was true of the banks and the foreign depositors in *Florida Bankers*, UPS was not a taxpayer under the Puerto Rico excise tax scheme nor was it part of a general class of persons upon whom Puerto Rico relied for tax collection. As the Court noted, the case was not a "prototypical" Butler Act or TIA case because the Puerto Rico delivery ban "targets third parties instead of those who owe the tax." 318 F. 3d at 331. In contrast, DMA's members are part of the class of taxpayers who owe use tax under Colorado law, although those members are excused from actually collecting the tax pursuant to this Court's decision in *Quill*. Furthermore, the injunction sought by UPS to bar the state from enforcing the delivery ban left the state free to collect the tax from package recipients. *Id.* The injunction DMA seeks would make it impossible for the state to collect the tax from Colorado consumers because the state would not have the information necessary to identify those consumers and, if necessary, to initiate audits.

In contrast, in *Wells v. Malloy*, 510 F.2d 74 (2d Cir. 1975), the license suspension provisions were hardly necessary for the state to identify the taxpayer; the fact the state was suspending the license indicated the state already knew who the taxpayer was. The license suspension provision was thus merely an indirect method of coercing compliance. 510 F.2d at 77. Again, Colorado has no way of identifying the Colorado consumers who purchased property from DMA's members without the information required by the notice and information statute.

II. Comity and Federalism Principles Underpinning the TIA Should Inform the Determination of How to Apply the Act to the Circumstances of this Case.

DMA describes the TIA as serving a similar purpose to the Anti-Injunction Act, which prohibits suits in the federal court for the purpose of restraining the assessment or collection of any tax. Brief for Petitioner at 5. DMA also contends that the meaning of the TIA is best understood in light of the language, interpretation and application of the AIA as well as other statutes, including the Butler Act, 48 U.S.C. § 872 (limiting federal court jurisdiction in certain suits against Puerto Rico), and the Johnson Act, 28 U.S.C. § 1342 (limiting federal court jurisdiction in certain suits involving state public utility commissions) *Id.* at 6. These comparisons, however, gloss over both the history of the TIA and its important purpose in preserving an essential element of state sovereignty.

It is true that both state and federal taxes are generally imposed by way of administrative processes and procedures designed to allow challenges by private parties against the government, while at the same time, preserving the need of the government to enforce the law efficiently and without undue interference or disruption. Preserving these administrative processes and procedures, (requirements to pay over taxes and claim refunds) and the legitimate governmental imperatives they serve, is clearly one purpose for limiting federal district court jurisdiction, whether it be over federal tax matters, or state tax matters. *Hibbs v. Winn,* 542 U.S. 88, 103 (2004). But the history of the TIA demonstrates that federal courts had concerns not just over short-circuiting state administrative processes, but also over the appropriateness of their granting equitable relief in cases where state tax matters are concerned. Brief for Petitioner at App. 21-23.

Moreover, unlike diversity jurisdiction, which provides citizens of different states a forum in which their challenge may be heard without an advantage to either, whether real or perceived, a suit against a government, whether federal or state, implicates sovereign immunity from suit, which, while embodied in the Eleventh Amendment, pre-dates the Constitution.

A. The History of the TIA and its Basis in the Principles of Comity Support the Conclusion that its Jurisdictional Bar was Meant to Apply in Cases Where an Essential Mechanism of State Tax Collection is at Issue.

This Court has held that the TIA's bar was meant to encompass declaratory judgments, even though the text of the TIA is silent on the issue. *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293, 299 (1943). Although the Act speaks only of suits "to enjoin, suspend, or restrain the assessment, levy, or collection of any tax," the Court held that the declaratory judgment procedure might, in "every practical sense" operate to suspend collection of the state taxes until the litigation is ended. Therefore, the same considerations that "led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint " *Id.* The Court further concluded that there was nothing in the enactment of the TIA that indicated congressional disapproval of the policy that had been adopted by the federal courts at that time of refraining from the exercise of their equitable jurisdiction in state tax cases. *Id.*

The reluctance of federal courts to exercise their equitable jurisdiction "is of peculiar force in cases where the suit is brought to enjoin the collection of a state tax" in federal court. *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932). Indeed, federal courts have long recognized that state courts may provide adequate remedies for plaintiffs asserting a federal right, and that these rights may be preserved without the interference of federal courts. *Id.* at 526. Such recognition does not support DMA's claim that access to federal courts is a paramount interest where state fiscal matters are concerned, or that there is any justification for a lack of confidence in the ability of state courts to be neutral and fair in such cases. Brief for Petitioner at 54. Nor is this a case in which diversity jurisdiction is implicated. Accordingly, neither DMA's citation to Justice Story's Commentaries concerning Article III of the Constitution and the provision granting jurisdiction to federal courts in controversies between citizens of different states, nor its citation to Justice Marshall's opinion in *Bank of the United States v. Devaux*, 9 U.S. (5 Cranch) 61, 87 (1809) is on point when the controversy is not with a citizen of another state but with the state itself. *Id.* at 55-56.

This Court has recognized that TIA is best understood as a "partial codification" of this doctrine of comity, expressing federal reluctance to interfere in state affairs. *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 590 (1995); *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 414 (2010). Principles of comity warranted dismissal of a federal lawsuit by Ohio taxpayers challenging the tax benefits received by competitors in *Commerce Energy*, based on three factors which are equally applicable here. First, the issue did not involve any fundamental right or suspect classification; second, the plaintiffs were seeking to improve their competitive position *vis-à-vis* other taxpayers; and third, state courts were better positioned than their federal counterparts to correct any violation. 560 U.S. at 431. As in *Commerce Energy*, DMA raises no issue involving a fundamental right or suspect classification. A decision in favor of DMA would allow it to maintain, unimpeded, a competitive advantage over in-state competitors who must collect tax. As Colorado points out in its Response, these same in-state competitors lack the access to federal courts when contesting whether and how the state may impose its collection and reporting requirements. Respondent's Brief at 43. DMA is certainly attempting to improve its competitive position *vis-à-vis* other retailers. And finally, it is certainly possible in any case challenging multiple requirements, such as this one, for a court to determine that some portion of the requirements are invalid. This would require an exercise of discretion about how the rest of the statute's requirements may be implemented, which mitigates against bringing the suit in federal court, where the basis for exercising such discretion is lacking.

B. Principles of State Sovereignty Also Support the Conclusion that the TIA Applies in this Case.

States are not just sovereign in name. Rather, under our federal system of government, states retain a "substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Alden v. Maine*, 527 U.S. 706, 714 (1999). The founders considered sovereign immunity from suit essential to our federal system. *Id.* at 715. State sovereign immunity from suit does not flow from the grant of some right by the national government, but was retained by the states in the formation of that government, and is embodied in the Eleventh Amendment to the Constitution. *Id.* at 721-723. As this Court explained about the Eleventh Amendment in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996):

> Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, 'we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition which it confirms. That presupposition, first observed over a century ago has two parts: first,

> that each State is a sovereign entity in our federal system; and second, that it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. *Internal quotations and citations omitted.*

This Court has recognized that the Supremacy Clause and the Eleventh Amendment of the Constitution are in tension and has provided a means for suits in equity to be brought by a private citizen against a state official for the ongoing violations of federal law under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). *Virginia Office for Protection and Advocacy v. Stewart*, 131 S.Ct. 1632, 1637-38 (2011). Nevertheless, state sovereign immunity from suit as embodied in the Eleventh Amendment retains its vitality and the Court has rejected claims that Congress possesses the power to abrogate that immunity under the Commerce Clause. *Id.* Moreover, while the exception in *Ex parte Young* has persisted, this Court has also expressed concern over any expansion of that exception. *Id.* at 1648 (Roberts, C.J., dissenting). The TIA was passed in response to and provides a bar against the jurisdiction that might otherwise be asserted under *Ex parte Young*. *Rosewell v. LaSalle Nat. Bank,* 450 U.S. 503, 522 (1981); *Perez v. Ledesma*, 401 U.S. 82, 104-115 (1971). Therefore, the same respect for state sovereign immunity and the role of the states in our federal system that counsels against the expansion of the exception under *Ex parte Young* also counsels against any expansion of federal court jurisdiction to hear a suit challenging the application of a state tax collection requirement.

CONCLUSION

The Commission urges this Court to affirm the judgment of the United States Court of Appeals for the Tenth Circuit that the TIA bars this suit. A contrary holding would impose harmful consequences on state tax administration and enforcement.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

No. 13-1032

IN THE

Supreme Court of the United States

DIRECT MARKETING ASSOCIATION,
Petitioner,
v.
BARBARA BROHL, IN HER CAPACITY AS
EXECUTIVE DIRECTOR, COLORADO DEPARTMENT
OF REVENUE,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit**

BRIEF OF *AMICI CURIAE* NFIB SMALL BUSINESS LEGAL CENTER, ASSOCIATION OF NATIONAL ADVERTISERS, NETCHOICE, ELECTRONIC RETAILING ASSOCIATION, AND AMERICAN CATALOG MAILERS ASSOCIATION, INC., IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Tax Injunction Act, 28 U.S.C. § 1341, bars federal court jurisdiction over a suit brought by non-taxpayers to enjoin the informational notice and reporting requirements of a state law that neither imposes a tax, nor requires the collection of a tax, but serves only as a secondary aspect of state tax administration.

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INTERESTS OF THE *AMICI*[1]

A. The Common Interest of Each of the *Amici*. Each of the *Amici* has an interest in preserving the favorable economic and business-related benefits that flow from this Court's ruling in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). There, this Court held that the dormant commerce clause doctrine prohibited a state from pressing an out-of-state vendor into service as a revenue collector for the state's sales tax on goods sold by the vendor to in-state customers. As a result, businesses of all sizes (including small vendors) with geographically dispersed clientele have been able to compete and grow without the fixed (and uncompensated) cost of acting as an agent for 49 states in addition to the State in which each is present.

The practical consequences of *Quill Corp.* would be undermined by anything less than a reversal and remand in this case. An affirmance would permit each State to avoid litigation in a lower federal court regarding the validity of the State's impressment of an out-of-state vendor into the State's service unless the out-of-state vendor relinquishes its rights under *Quill Corp.* As demonstrated below, each of the *Amici* has an interest in preventing the erosion of the practical consequences of *Quill Corp.* that could result from this Court's disposition of this case.

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[1] Pursuant to Sup. Ct. R. 37.6, *amici* certify that no counsel for a party to this action authored any part of this brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission. Letters granting blanket consent to the filing of amicus briefs are on file with the Clerk of Court.

B. The Particular Interests of Each *Amicus*. The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public-interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts. The National Federation of Independent Business is the nation's leading small-business association; its mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents 350,000 businesses nationwide.

The Association of National Advertisers (ANA) provides leadership that advances marketing excellence and shapes the future of the industry.

Founded in 1910, ANA's membership includes more than 600 companies with 10,000 brands that collectively spend over $250 billion in marketing and advertising to communicate with consumers and conduct business operations across state and national boundaries. ANA strives to communicate marketing best practices, lead industry initiatives and advance and protect the rights of marketers in the courts.

NetChoice is a trade association of leading e-commerce and online companies promoting the value, convenience, and choice of Internet business models. Members of NetChoice include online commerce platforms that bring together sellers and buyers from different states and nations. NetChoice has a critical interest in ensuring that businesses can bring claims against states in federal court, particularly where the Internet enables these businesses to engage in commerce across state borders.

Representing a more-than $300-billion market, the Electronic Retailing Association (ERA) is the trade association that represents the global leaders of the direct-to-consumer marketplace—

companies which use the power of direct response to sell goods and services on television, online and on radio. ERA works to protect the regulatory and legislative climate of direct response while ensuring a favorable landscape that enhances direct response marketers' ability to bring quality products and services to the consumer. In addition, the association strives to promote thought leadership and the sharing of knowledge to advance the direct response industry, as well as to facilitate relationships that help members to drive their businesses' growth and profitability. ERA represents more than 450 companies in 45 countries.

American Catalog Mailers Association, Inc. (ACMA) is organized as a nonprofit corporation under the laws of the District of Columbia, and has its principal place of business in Providence, Rhode Island. ACMA advocates in matters directly affecting the catalog business, including publishers, suppliers and vendors. Its membership is comprised of both large and small marketers across the country. Founded in 2007 in response to disastrous postal policy decisions, ACMA now focuses on any material policy or regulatory issue specific to catalog marketing.

SUMMARY OF ARGUMENT

The Tax Injunction Act (TIA), 28 U.S.C. § 1341, does not deprive the District Court of jurisdiction to adjudicate Petitioner's claims in this action. Accordingly, the judgment below should be reversed, and the case should be remanded.

1. Petitioner brought this action challenging the validity of Colo. Rev. Stat. § 39-21-112(3.5) ("the Colorado Act") on federal constitutional grounds. The Colorado Act provides in relevant part for punitive fines on non-taxpayer out-of-state vendors unless they satisfy certain informational notice and reporting requirements that are wholly unrelated to any tax liability of their own.

2. Petitioner's civil action arises under the Constitution of the United States. The District Court had original jurisdiction over the case under 28 U.S.C. § 1331, unless it belongs to a class of civil actions described in a federal statute that effectively creates an exception to the general rule in 28 U.S.C. § 1331. The Court of Appeals incorrectly ruled that

the TIA deprives the lower federal courts of jurisdiction over actions such as this one.

a. Petitioner's action is not one described in the text of the TIA. Moreover, an interpretation of the TIA that would divest the lower federal courts of jurisdiction over the action cannot be reconciled with the text of the TIA.

b. The judgment below depends on an erroneous interpretation of the term "restrain,"" as used in the TIA, that will result in the denial of timely access to a federal forum on a federal question under circumstances far beyond what the statutory text, the legislative history, and this Court's precedents will permit.

c. The judgment below rests on an interpretation of the word "collection" and the concept of the "collection of taxes" that accords interpretive significance – arguably decisive interpretive significance -- to definitions of those terms in state legislation. This approach allows each State to reduce the subject matter jurisdiction of the lower federal courts by adopting statutes defining "collection" of a tax to include compulsory activities by non-taxpayers specified in the legislation, even though those activities do not fall within the ordinary sense of the word "collection" in the tax context. The TIA cannot be interpreted and applied in that manner, because the TIA was adopted pursuant to an enumerated power that is exclusively national. Thus, any interpretation of the phrase "collection" that permits its meaning to vary because of features of one state statute *versus* another is necessarily incorrect.

d. The Tenth Circuit's interpretation and application of the TIA in this case fails to take into account the interpretive significance of the TIA's exception in cases where a plaintiff is not afforded a "plain, speedy and efficient remedy." This omission led to the extraordinary holding that the TIA applies to an action by a person not subject to the relevant tax.

3. The Tenth Circuit's holding is in sharp conflict with this Court's Commerce Clause jurisprudence in that it will encourage state legislatures to enact legislation that imposes burdens selectively on out-of-state retailers based on their exercise of rights under *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and saddles them with burdens

of tax administration and collection that should be borne by the states themselves.

ARGUMENT

I. The Interpretation of the TIA on Which the Judgment of the Court of Appeals Rests Conflicts with the TIA's Statutory Text and Legislative History

This case arises under the U.S. Constitution. Unless Congress specified an exception to its general grant of federal question jurisdiction to the district courts in 28 U.S.C. § 1331, the District Court had original jurisdiction over Petitioner's civil action. *See*, 28 U.S.C. § 1331. *Mims v. Arrow Financial Services, L.L.C.*, ___ U.S. ___, 132 S.Ct. 740, 743 (2012).

The TIA provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The judgment of the Court of Appeals in this case dismissed Petitioner's complaint on the sole ground that under the TIA, the District Court lacked subject matter jurisdiction over Petitioner's claims.

The judgment below relies on the Tenth Circuit's interpretation of the TIA and the Tenth Circuit's application of its interpretation to the facts of this case. With respect, Amici submit that the Court of Appeals erred in this regard.

To begin with, the Tenth Circuit treated the word "restrain" as a non-technical term. Using definitions of that word from general-purpose dictionaries, the Tenth Circuit concluded that the relief Petitioners sought would "restrain" the "collection" of State taxes because it would "limit, restrict, or hold back the state's chosen method of enforcing its tax laws and generating revenue." *Brohl* at 913.

This interpretation of the TIA misses the mark by such a broad margin that it transforms the statute's meaning and purpose. As shown below, the TIA deprives the lower federal courts of jurisdiction to grant specific remedies that would require a State temporarily or permanently to cease its own proceedings with respect to a plaintiff's own liability for the type of tax involved. The Colorado Act imposes a use tax on the amount paid by a Colorado resident for a good provided to the resident by an out-of-state vendor that does not collect and remit the resident's Colorado sales tax. Colo. Rev. Stat. § 39-21-112(3.5) Thus, if the answer to the question presented is yes, the lower federal courts will have two new missions under the TIA: (1) to determine whether applying a state's law with respect to the affirmative duties of out-of-state parties who cannot be liable for a tax would increase the amount of revenue derived from the tax in question; and, if so, (2) to dismiss any action by the non-taxpayer, including a challenge to the constitutional validity of the state statute, thereby preventing or postponing review of the non-taxpayer's claims under federal law.

For the reasons stated below, the interpretation and application of the TIA adopted by the Court of Appeals on the facts of this case were erroneous.

A. The Judgment of the Court of Appeals Rests on a Misinterpretation of the Term "Restrain" As It Is Used In the TIA

The Tenth Circuit's interpretation of the TIA is incorrect because it misconstrues the term "restrain," giving it an insupportably broad meaning and effect. In the TIA, the term "restrain" refers only to a form of judicial relief, and only to the extent that the form of relief would keep a state from carrying out processes that constitute "the assessment, levy or collection" of any state tax.

Petitioner's Complaint clearly did not seek a stay or injunction restraining Colorado from proceeding with any "assessment, levy or collection" of its use tax. The Tenth Circuit interpreted the TIA's prohibition of an action to "restrain [the] collection of a State tax" to authorize and require an exception to federal question jurisdiction in actions by non-taxpayers merely because the requested relief might have adverse downstream effects on the amount of revenues the state realizes from a particular tax. Other Courts of Appeals have rejected such an interpretation. *See*, *BellSouth*

Telecomms., Inc. v. Farris, 542 F.3d 499, 503-504 (6th Cir. 2008) ("The [TIA] does not strip federal courts of jurisdiction over all claims that might, after this or that happens, have some negative impact on local revenues; it strips jurisdiction over claims seeking to enjoin the collection of State 'tax revenue.'"); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1383 (8th Cir. 1997) ("the plaintiffs do not question the County's authority to levy taxes. While the relief they seek may well affect the revenue that the County raises , this secondary economic effect would not require the court to enjoin, suspend, or restrain any tax collection.")

The consequence of a ruling by the District Court in Petitioner's favor would merely have prohibited the state from conscripting an out-of-state vendor to perform actions specified in the Colorado Act (at the vendor's expense) that Respondent believes would have an effect on Colorado residents' compliance with Colorado's use tax regime. The actions specified in the Colorado Act amount to efforts by the vendor to urge Colorado residents to obey Colorado law by self-reporting Colorado use tax on purchases from out-of-state vendors in which no sales tax was paid on behalf of the Colorado resident.

The Colorado Act's educational/hortatory goals themselves were not the gravamen of Petitioner's Complaint in this case. Petitioner merely sought to enforce its rights not to be forced to participate in pursuing those goals. Thus, the District Court did not enjoin the state from engaging in those functions. Colorado would not have been permitted to force these functions on out-of-state vendors exercising their *Quill Corp.* rights, but Colorado would remain free to send its own communications to its residents to stimulate greater voluntary compliance with its use tax. No one suggests that a statement from the government of Colorado regarding the duty to pay use taxes is necessarily less persuasive than (for example) the same statement made by a vendor of hobbyist supplies located in a different state. Thus, the relief requested by the Petitioner in the District Court would not have "restrained" the collection of state use taxes, either in the sense covered by the terms of the TIA or even in the sense that concerned the Court of Appeals.

B. The Judgment of the Court of Appeals Erroneously Rests on an Interpretation of the Term "Collection" In the TIA That Effectively Gives a State the Authority to Alter the Scope of the TIA Through State Legislation.

1. The Tenth Circuit Failed to Recognize that the TIA's Terms Such as "Collection" Must Be Interpreted Without Regard to State Statutory Law.

Because the source of Congress's authority to adopt the TIA is an exclusively national power, the TIA's terms must be interpreted and applied according to a single rule or set of rules drawn exclusively from federal law, to the exclusion of state legislation. Congress's only legislative authority for adopting the TIA is its exclusive power to create the lower federal courts. The States may not legislate with respect to the subject matter of an exclusively national power. *See, e.g., U.S. Term Limits v. Thornton,* 514 U.S. 779 (1995). "'[T]he States can exercise no powers whatsoever, which exclusively spring out of the national government, which the constitution did not delegate to them.'" *Cook v.*

Gralike, 531 U.S. 510, 519 (2001), ***citing and quoting*** 1 Story's Commentaries on the Constitution of the United States § 627 (3d ed. 1858). Because the People delegated only to the national government the power to create the lower federal courts, an interpretation of the TIA that permitted its scope to expand because of a feature of state legislation would be inconsistent with the allocation of governmental powers ordained by the Constitution. *Cf.*, *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 240 (1985) (in an action by an Indian tribe for possession of tribal lands, previously held to arise exclusively under federal common law because of the national government's exclusive powers to treat with Indian tribes, *held* that it would be inappropriate to borrowing a state statute of limitations).

To be sure, an Act of Congress might entail the exercise of more than one delegated power. For example, the act prohibiting the U.S. District Court for the District of Puerto Rico from enjoining the collection of any tax under Puerto Rican law fits comfortably within both Article I, Sec. 8, cl. 9 and within the Property Clause's grant of Congressional authority to make needful rules and regulations respecting the Territories of the United States. In some cases, one of the powers might not be exclusively federal. For example, the Anti-Injunction Act could be treated as necessary and proper to the exercise of the national government's power to collect taxes; to spend for the public welfare; and as an exercise of Article I, Sec. 8, cl. 9.

By contrast, when it comes to identifying the Congressional power exercised in adopting the TIA, there is only one plausible candidate: Congress's implied power to limit the jurisdiction of the lower federal courts it may choose to create.

The power to define the jurisdiction of the lower federal courts has been deduced from only two provisions of the Constitution, namely Art. I, Sec. 8, cl. 9 and/or Article III. At least as early as 1845, this Court treated the Congressional power to constitute the lower federal courts as including an implied power to limit their jurisdiction. *See Cary v. Curtis*, 44 U.S. 236, 245 (1845). Subsequent decisions confirm this reading of U.S. Const. Art. I, Sec. 8, cl. 9. *See, e.g., Ankenbrandt v. Richards*, 504 U.S. 689, 697 (1992), *citing and quoting Palmore v. United States*, 411 U.S. 389, 401 (1973). *Cf., also, Glidden*

Co. v. Zdanok, 370 U.S. 530, 551-52 (1962) (plurality opinion) (collecting cases). In some instances, this Court has held that the Congressional power to limit the jurisdiction of the lower federal courts is implied by Article III together with Art. I, sec. 8, cl. 9. *See, e.g., Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 474 (1959).

Article III and Art. I, Sec. 8, cl. 9 create exclusively national powers. Thus, the implied power to limit the jurisdiction of the lower federal courts stems from an authority delegated by the People *exclusively* to the national government. The state governments never had the power to create a lower federal court under Article III, or to circumscribe its jurisdiction as specified by the national legislature, because no power to create a federal court yet existed. Thus, before the Constitution, there could not have been a state power to control the jurisdiction of the lower federal courts. *Gralike, supra,* 531 U.S. at 522-23. This Court never has suggested that a state can exercise a legislative authority delegated by the Constitution to create an inferior Article III court. Without that power, a state lacks any basis for an implied power to shrink the jurisdiction conferred by Congress on a lower federal court by 28 U.S.C. 1331. *Id.*; *cf. Harbison v. Bell,* 556 U.S. 180, 186-87 (2009) (holding that the statutory phrase "proceedings for executive or other clemency" in 28 U.S.C. § 3599(e) reveals that Congress intended to include state clemency proceedings within the statute's reach, since federal clemency is exclusively executive, because "only the president has the power to grant clemency for offenses under federal law." U.S. Const., Art. II, § 2, cl. 1.")

When Congress exercises an exclusively national power to legislate, individual States cannot legislate on the subject matter of the federal statute. *See Houston v. Moore*, 18 U.S. 1, 7 (1820) (dictum) ("[I]t is conceded that, after a detachment of the militia have been called forth, and have entered into the service of the United States, the authority of the general government over such detachment is exclusive. This is also obvious. Over the national militia, the State governments never had, or could have, jurisdiction.") This principle has been a persistent theme since then. *See, e.g., Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 381 (2000);

Oklahoma Tax Com'n v. Chickasaw Nation, 515 U.S. 450, 455-58 (1995); *Perpich v. Dep't of Defense*, 496 U.S. 334, 353-54 (1990); *Oneida Indian Nation v. County of Oneida.*, 414 U.S. 661, 667 (1974) (holding that a claim for possession of tribal lands raises a federal question because "once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law."); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938) (Twenty-First amendment does not give states the power to regulate the use of alcohol within a national park over which the national government has exclusive jurisdiction). Thus, an interpretation of the TIA that permitted its scope to expand because of state law necessarily would be incorrect.

Interpreting the TIA's terms so that state legislation can vary its scope to the degree seen in this case is substantively no different from applying that state legislation directly. Other Courts of Appeals have concluded that the lower federal courts should not defer to state law or practice in defining terms in the text of the TIA. *Robinson Protective Alarm Co. v. Philadelphia*, 581 F.2d 371, 375 (3d Cir.

1978) ("Congress' power to implement or limit federal courts' jurisdiction is so fundamental that we decline to infer a congressional intent to leave a jurisdictional provision dependent on state law absent an unambiguous and express incorporation by statute."); *Tramel v. Schrader*, 505 F.2d 1310, 1315, n. 7 (5th Cir. 1975) (in interpreting the statutory text of the TIA, "[t]he proper question is not what the Texas courts have said the Texas legislature meant when it used the term but what Congress meant when it used the term").

Similarly, the TIA should not be applied based on a concept of the "collection of taxes" that might cause "collection" to mean one thing in Colorado and another in Texas. While states may choose different constitutionally-permissible methods of maximizing tax revenues and creating incentives for greater taxpayer compliance, they cannot expand the statutory definition of "collection" in the TIA when doing so. *Wells v. Malloy*, 510 F.2d 74, 77 (2d Cir. 1975) (refusing to apply TIA to taxpayer challenge to state's refusal to issue him a driver's license until tax debt was paid and rejecting the contention that "collection" "could be read broadly to include anything that a state has determined to be a likely method of securing payment"). Every effort by a state to tighten the screws on its taxpayers does not qualify as "collection" under the TIA merely because the state's aim is to generate more revenue.

Contrary to these principles, the Tenth Circuit focused on the fact that Colorado intended the challenged enactments to be part of its overall scheme for maximizing use tax collections. For example, the Tenth Circuit found the TIA applicable in part because this litigation would "hold back the state's chosen method of enforcing its tax laws and generating revenue," and the "state-chosen method to secure taxes would be compromised." *Direct Marketing Assoc. v. Brohl*, 735 F.3d 904, 913 (10th Cir. 2013). Likewise, the Tenth Circuit found it significant that the title of the notice and reporting legislation was "An Act Concerning the *Collection of Sales and Use Taxes* on Sales Made by Out-of-State Retailers." *Brohl* at 914 (emphasis added by the Tenth Circuit).

Thus, the Tenth Circuit looked to the labels that the Colorado Act attaches to the activities required of out-of-state retailers in order to determine the statutory significance of those activities under the TIA. This led to misapplication of the TIA to the facts in this case.

2. "Collection" Under the TIA Does Not Include the Requirements Imposed on Petitioner by the Colorado Act.

The requirements imposed on out-of-state retailers by the Colorado Act cannot reasonably be considered collection measures. In tax parlance as well as everyday speech, "collection" is undertaken only after a liquidated amount has been assessed and payment of that amount is due. *See, e.g.,* The IRS Collection Process, IRS Publication 594 (Rev. 4-2012) ("The collection process is a series of actions that the IRS can take against you if you don't voluntarily pay them. The collection process will begin if you don't make your required payments in full and on time, after receiving your bill.") *Cf. Jones v. Liberty Glass Co.,* 332 U.S. 524, 531 (1947) (presumption that words used in federal tax legislation have their ordinary meaning).

In federal tax parlance, "collection" refers to activities of a government official with respect to taxes imposed under federal tax law. *See, e.g.*, Ch. 64, Subchapters A through D of the Internal Revenue Code of 1986, as amended ("Code"), 26 U.S.C. §§ 6301-6344. Under Chapter 64, Subchapter B, a taxpayer may make voluntary payments of taxes to the federal taxing authority, including payments of estimated taxes, *see, e.g.*, Code § 6315, for which the taxpayer would be entitled to a receipt from the federal tax official upon demand, *see* Code § 6314(a). But this sense of the word "collection" is not germane to the question presented in this case, for at least three reasons. *First*, a vendor that is not present in a State is not a tax official of that State. *Second*, since a person disinclined or unable to pay a tax voluntarily does not require an injunction issued by a lower federal court to prevent voluntary payment, the "voluntary payment" aspect of "collection" simply is not relevant to the meaning of that term as used in the TIA. *Third*, because the Colorado Act does not impose a duty to receive (or even authorize the receipt of) payments of Colorado sales tax by an out-of-state vendor exercising its *Quill Corp.* rights, this Subchapter B aspect of the term "collection" is not relevant to the application of the TIA in this case.

What is relevant in this case is the meaning of the term "collection" when it refers to steps a federal official may take *against an unwilling or otherwise non-compliant taxpayer* to secure payment or receive payment of a tax that already is due and owing. These include a statutory lien, Code § 6320; filing a notice of the lien, Code § 6321; a levy on the property of the person owing the unpaid tax (a concept that includes the seizure of the taxpayer's property), Code § 6331; and the sale of the taxpayer's seized property, Code § 6335. The Colorado Act does not require out-of-state vendors to take any of these steps. Indeed, given this Court's holding in *Quill Corp.*, Colorado could not lawfully require out-of-state vendors to take these steps. Thus, the Petitioner's action could not have been an action to restrain the "collection" of Colorado's use tax.

Here, Colorado seeks to delegate to out-of-state retailers the task of convincing Colorado residents to pay use taxes that are by definition imposed on them alone. But the Colorado Act does not require an out-of-state vendor to *collect* use taxes. For example, it does not require an out-of-state vendor to seize a taxpayer's assets or seek to garner a Colorado resident's wages. Under the Colorado Act, the Colorado Department of Revenue's authority to collect use taxes due and payable is not shared with anyone else.

Instead, out-of-state retailers' purported role under the Colorado Act is to advocate for voluntary compliance by Colorado residents with Colorado's use tax system. The retailer's role is to issue warnings and "important sales tax information" notices, in forms specified by Colorado, at the retailer's own expense. The out-of-state retailers do not actually receive or collect anything. Colorado's scheme of foisting upon out-of-state retailers the burden of educating taxpayers about the use tax may be a cost-effective and politically expedient means of educating taxpayers, but it is not "collection," or even a "collection method."

Even the Tenth Circuit appears to agree that the TIA cannot reasonably be applied to any challenge to what the state might deem a collection method, but it makes a peculiar distinction to bring this case within the statute's scope:

> we do not interpret the TIA as applying to any action challenging a state law

> that could possibly secure tax payment. But here DMA challenges laws enacted to notify consumers of their duty to pay use tax and to garner information on consumer purchases to ensure tax compliance through audits. Its lawsuit targets measures that attempt to ensure tax compliance in the first instance, not sanctions imposed after a taxpayer has admittedly refused to pay taxes.

Brohl, 916. The temporal distinction on which the foregoing passage relies is utterly without support in the statutory text. If anything, the term "collection" is a better fit with post-assessment efforts than activities designed to help ascertain individual consumers' liability and convince them to be proactive about filling the state's coffers.

The purpose of the legislation and regulations at issue here is to emphasize to consumers that they may be liable for taxes, in the hope that they will be more motivated to pay them. See, *Brohl* at 908 (citing Colorado's brief in the Tenth Circuit for the proposition that transactional notice "serves to educate consumers about their use tax liability with the aim of increasing voluntary compliance," the annual notice "arms the consumer with accurate information to facilitate reporting and paying the use tax," and the report to the Department of Revenue "is designed to increase voluntary consumer compliance with the state tax laws because consumers know that a third party has reported their taxable activity to the taxing authority"). These functions might be characterized as educating, persuading, coercing, or threatening. They cannot reasonably be called "collection."

C. The Tenth Circuit's Interpretation of the TIA Fails to Take Into Account the Significance Of the "Plain, Speedy and Efficient Remedy" Qualifier

In addition to its mistaken interpretation of "restrain" and "collection," the Tenth Circuit erred in failing to appreciate the importance of the qualifier "where a plain, speedy and efficient remedy may be had in the courts of such State" to the interpretation and application of the TIA. 28 U.S.C. § 1341. The clause would have been superfluous if the statute had been meant to apply to a non-taxpayer litigating to avoid compliance costs. Non-taxpayers do not need special remedies, as the relief they would seek does not include recovery of taxes paid under protest.

The fact that Congress specifically called for federal courts to evaluate the efficiency and adequacy of state law remedies strongly suggests that the statute is meant to apply only to taxpayers in particular. This Court expressly recognized this in *Hibbs v. Winn*, 542 U.S. 88 (2004):

> this Court has interpreted and applied the TIA only in cases Congress wrote the Act to address, i.e., cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes. We have read harmoniously the § 1341 instruction conditioning the jurisdictional bar on the availability of "a plain, speedy and efficient remedy" in state court. The remedy inspected in our decisions was not one designed for the universe of plaintiffs who sue the State. Rather, it was a remedy tailormade for taxpayers.

Hibbs, supra, 542 U.S. at 107 (citations omitted).

The Tenth Circuit did not address directly the language in *Hibbs* suggesting that the "plain, speedy and efficient" language reflected Congressional intent to limit application of the statute to taxpayer actions. Instead, the Tenth Circuit concluded that out-of-state retailers could back their way into a "plain, speedy and efficient" remedy by relinquishing their *Quill* rights and collecting sales tax. *Brohl* at 919-20. In that case, provided they paid sales tax out of their own pockets rather than passing them to consumers as retailers generally do, they could seek a refund on the theory that their payment of the sales tax was the product of coercion due to the unconstitutional notice and reporting obligations. *Id.* Setting aside the other problems with this "remedy,"[2] it is further proof of the inapplicability of the TIA to non-taxpayers. Even the Tenth Circuit appears to recognize that the only way the statute really fits this scenario is if out-of-state retailers surrender their *Quill* rights and become taxpayers.

D. The Tenth Circuit's Interpretation of the TIA Conflicts With the Legislative History of the TIA

This Court has recognized that the TIA derived from the Anti-Injunction Act (AIA), which places a similar limit on challenges to federal tax enforcement and collection. *Jefferson County v. Acker*, 527 U.S. 423, 434-435 (1999). As this Court explained in *Hibbs*, "[i]n both [the AIA] and [the TIA], Congress directed taxpayers to pursue refund suits instead of attempting to restrain collections. Third-party suits not seeking to stop the collection (or contest the validity) of a tax *imposed on plaintiffs* were outside Congress' purview." *Hibbs* at 104 (emphasis in original; internal citations omitted). This Court summarized the legislative history of the TIA as follows:

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[2] If an out-of-state retailer exercising its *Quill Corp.* rights discharges the sales and use tax liability of a Colorado customer by paying the State out of its own pocket, the amount paid on behalf of the Colorado customer ordinarily would be includible in the customer's gross income for purposes of the individual federal income tax. *See, e.g., Old Colony Trust Co. v. Commissioner of Internal Revenue,* 279 U.S. 716 (1929) (amount of employer's payment of employee's federal income tax liability held to be includible in employee's gross income).

> In short, in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority. Nowhere does the legislative history announce a sweeping congressional direction to prevent federal-court interference with all aspects of state tax administration.

Id. at 104-05 (internal quotation and citation omitted).

Notwithstanding this language, the Tenth Circuit cited *Hibbs* for the proposition that the legislative history of the TIA suggested it was enacted to meet "state-revenue-protective objectives." *Brohl* at 911 (citing *Hibbs*, 104.). However, the two "state-revenue-protective objectives" articulated in *Hibbs* were preventing out-of-state firms from gaining an advantage over in-state competitors by litigating in federal court and preventing taxpayers from "withholding large sums, thereby disrupting state government finances." *Hibbs* at 104. Neither objective is served by applying the TIA in this case. In-state retailers are not subject to the challenged requirements and neither the DMA nor its members are taxpayers. While the legislative history of the TIA supports the view that Congress passed the statute to prevent taxpayers from evading collection efforts by invoking federal jurisdiction, there is no evidence that Congress was worried about non-taxpayers asserting their rights in federal court in response to a state forcing them to help collect other people's taxes.

II. The Tenth Circuit's Holding Is In Conflict With This Court's Dormant Commerce Clause Jurisprudence and Would Result in an Erosion of the Rights Articulated in *Quill Corp.*

If states are entitled to evade federal review of use tax schemes that outsource administration and collection to unwilling out-of-state retailers, there is likely to be a drift toward piling ever more significant burdens on out-of-state retailers. Two troubling aspects of the Tenth Circuit's opinion suggest such an outcome: (1) the deference to state law and practice to define key terms of the TIA, such as what is a "tax" and what is "collection;" and (2) the conclusion that the absence of a plain, speedy and efficient remedy is no impediment to TIA coverage as long as the state leaves out-of-state retailers the option to forfeit their *Quill* rights.

A. Undue Deference to State Law Interpretation of the Text of a Jurisdiction Stripping Statute Will Create Incentives for States to Discriminate Against Interstate Commerce

As explained above, the TIA limits the jurisdiction of federal courts. As such, it must be interpreted as a matter of federal law, with consistent federal law definitions of each statutory term. If the Tenth Circuit's deference to state interpretation were permissible, it is likely that the rights of out-of-state retailers recognized in *Quill Corp.* would be compromised. States would have an incentive to saddle out-of-state retailers with ever-more-burdensome obligations, secure in the knowledge that federal courts are unavailable as a forum for raising Commerce Clause objections. The political expediency of retaliating against out-of-state firms for exercising their *Quill Corp.* rights, to the benefit of in-state competitors, may lead states to engage in precisely the discrimination against interstate commerce that the Commerce Clause was designed to eliminate.

Making federal courts available to out-of-state retailers challenging state action as non-taxpayers serves much the same purpose as diversity jurisdiction. Diversity jurisdiction serves as a safeguard against "local attachments" by providing an impartial federal tribunal for resolving disputes between citizens of different states. Federalist No. 80. *See also, Bank of the United States v. Deveaux*, 9

U.S. (5 Cranch) 61 (1809). The need for a federal forum in cases of disputed state action against foreign non-taxpayers is even greater.

Without a presence in the state, and being non-taxpayers pursuant to *Quill Corp.*, out-of-state retailers are particularly vulnerable to exploitation. If the Tenth Circuit's opinion stands, state governments will be permitted to impose regulatory burdens exclusively on out-of-state retailers and also to characterize such burdens as part of a taxation scheme and thus immune from federal challenge. While state courts are fully capable of adjudicating constitutional claims, if states are empowered to manipulate the availability of a federal forum, discrimination against and exploitation of out-of-state retailers is likely. Just as diversity jurisdiction provides a safeguard against local bias, interpretation of the TIA pursuant to uniform federal standards that recognize the right to a federal tribunal in cases not involving taxpayer disputes is an essential safeguard against violation of the Commerce Clause rights of foreign firms.

B. The Tenth Circuit's Conclusion That Out-of-State Retailers Can Avail Themselves of a Plain, Speedy and Efficient Remedy By Waiving Their Rights Under *Quill Corp.* and Collecting Sales Tax Undermines This Court's Commerce Clause Jurisprudence

Perhaps foreshadowing the Hobson's Choice that would confront out-of-state retailers as a result of its expansion of the TIA, the Tenth Circuit suggested an out-of-state retailer could simply pay sales tax and seek a refund. *Brohl* at 919. It acknowledged a major caveat: if the out-of-state retailer wishes to seek relief on its own behalf, it cannot collect tax from consumers. *Brohl* at 919, n. 9.[3] In other words, to avail itself of the benefits of this method, out-of-state retailers would have to pay all sales tax out of their own pockets.[4]

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[3] The statutory section cited by the Tenth Circuit, Colo. Rev. Stat. Section 39-26-703, applies to claimed "exemptions." Colorado law provides that "[t]here is a strong presumption that taxation is the rule and exemption the rare exception." *S.W. Catholic Credit Union v. Charnes*, 665 P.2d 626 (Colo. App. 1982). It is therefore not clear whether a Commerce Clause claim could be brought pursuant to Section 39-26-703 at all, and it appears that even if so, a "strong presumption" would stack the deck against the party seeking to vindicate its Commerce Clause rights.

Assuming for the sake of argument that waiving their rights under *Quill Corp.* and the dormant Commerce Clause is a viable means by which out-of-state retailers may manufacture a "plain, speedy and efficient remedy" under state law, such a scheme highlights the flaw in the Tenth Circuit's theory. This Court's Commerce Clause jurisprudence, reflected in *Quill Corp.*, is a constitutional safeguard against state government interference with interstate commerce. Interpreting the TIA so as to encourage and perhaps even require out-of-state retailers to give up rights secured by the Commerce Clause turns federalism on its head. If federal jurisdiction under the TIA is malleable, subject to expansion at the will of the states, interstate commerce will be subject to exactly the local disruption that the dormant Commerce Clause was designed to eliminate.

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[4] Alternatively, the Tenth Circuit proposed that out-of-state retailers refuse to comply with their notice and reporting obligations and challenge the penalties imposed. *Brohl* at 920. However, the statutory language cited by the Tenth Circuit is premised on the filing of a tax return and applies only to a "taxpayer." Colo. Rev. Stat. § 39-21-103. It does not appear that Colorado has any provisions ensuring a "plain, speedy and efficient" remedy for a non-taxpayer who refuses to pay penalties.

While the TIA remains an important protection for state autonomy in the area of tax administration and collection, its scope is ultimately a matter left to federal control. This does not leave the states at the mercy of federal encroachment. As this Court has observed, "the Framers chose to rely on a federal system in which special restraints on federal power over the states inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552 (1985). An interpretation of the TIA that is destined to result in a steady chipping away at the rights secured by this Court's Commerce Clause precedents must be avoided.

CONCLUSION

The TIA does not limit federal jurisdiction over a federal law challenge to Colorado's attempt to force non-taxpayers to participate in the state's efforts to increase use tax revenues. The judgment below should be reversed and the matter remanded.

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No. 13-1032

IN THE
Supreme Court of the United States

DIRECT MARKETING ASSOCIATION,
Petitioner,
v.
BARBARA BROHL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND GOVERNMENT FINANCE OFFICERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

The National Governors Association (NGA), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the 50 States, three Territories, and two Commonwealths.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases raising issues of vital state concern.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, other than *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel of record for all parties have consented to this filing in letters on file with the Clerk's Office.

The U. S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

Government Finance Officers Association (GFOA) is the professional association of state, provincial, and local finance officers in the United States and Canada. The GFOA has served the public finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and the identification and promotion of best practices. Its 18,000 members are dedicated to the sound management of government financial resources.

Collectively, *amici curiae* are organizations whose members include state and local governments and officials from throughout the United States. These organizations regularly file *amicus* briefs in cases, like this one, raising issues of concern to their members. This case implicates an issue of federal jurisdiction with unique and existential importance to the sovereign interests of States and local governments that need to assess and collect tax revenues free from unwarranted federal interference in order to fund vital benefits and services for their residents.

Amici have united to urge this Court to affirm the Tenth Circuit's proper application of the Tax Injunction Act, 28 U.S.C. § 1341, to dismiss Petitioner's claims and allow them instead to be litigated in the Colorado courts, where Congress, with good reason, requires such claims to be resolved.

SUMMARY OF ARGUMENT

The increasing prevalence of electronic commerce has produced a deepening crisis for States and local governments whose solvency depend in large part on sales and use tax revenues. States have long required in-state merchants to collect and remit sales and use taxes from their customers. Due to this Court's decisions in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) and *National Bellas Hess, Inc. v. Dep't of Revenue of Illinois*, 386 U.S. 753 (1967), however, out-of-state merchants are exempt from this requirement. As online and mail-order shopping have continued to expand, without any power to require remote sellers to collect and remit sales and use tax, States and local governments are now losing an estimated $23 billion in annual tax revenue to these remote sales.

In response to this fiscal calamity, the State of Colorado enacted legislation requiring out-of-state merchants to summarize their total annual sales to each Colorado customer and report the information to the Colorado Department of Revenue. Third-party reporting requirements are a proven method for the assessment and collection of taxes in situations where the taxing authority must otherwise rely on taxpayers to self-report and voluntarily pay tax on those transactions. The Colorado law thus represents the best available method for the State to assess and collect the applicable use tax from its residents owed on remote sales.

The Tax Injunction Act (TIA), 28 U.S.C. § 1341, forbids federal district courts from assuming jurisdiction over claims seeking to "enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law[.]" In violation of this prohibition, Petitioner's lawsuit seeks to have the federal courts declare Colorado's chosen method for assessing and collecting use tax from its residents to be void and unenforceable.

Invalidation of the Colorado law requiring remote sellers to report their in-state sales would deprive the State of the information necessary to determine and record any and all use tax liability for those sales, assessments that would then trigger its levy and collection efforts. Granting relief to Petitioner thus would operate to restrain Colorado's assessment of use taxes on remote sales, assessments that otherwise would initiate collections, thereby depriving the State of tens of millions in annual tax revenue in violation of the TIA's broad jurisdictional bar.

The Tenth Circuit thus correctly held that the Tax Injunction Act barred the federal courts from entertaining this lawsuit. The peculiarized exceptions that Petitioner, for its benefit, asks this Court to read into the TIA conflict with precedent and have no basis in the statute's text or longstanding purpose to comprehensively divest federal courts of jurisdiction to interfere with state tax laws aimed at the assessment and collection of revenue.

This Court should affirm.

ARGUMENT

I. In The Age Of Electronic Commerce, The Inability Of States And Local Governments To Assess And Collect Sales And Use Taxes On Remote Sales Has Had A Catastrophic Impact On Their Revenues And Fiscal Stability.

A. The Rise of Internet Sales.

The 21st Century has seen a fundamental transformation in the methods by which commerce is conducted. Most Americans now shop online, and "e-commerce" has claimed an increasingly large share of sales in the United States. Online purchases total more than $4 trillion annually, representing more than 15 percent of all sales in the retail, wholesale, manufacturing, and service sectors. A recent PricewaterhouseCoopers study concluded that 67 percent of U.S. consumers made Internet purchases in 2011.[2] Another study found that 70 percent of consumers shopped online in 2013, with almost 30 percent making 12 or more purchases.[3] In 2014, a

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[2] PRICEWATERHOUSECOOPERS, UNDERSTANDING HOW U.S. ONLINE SHOPPERS ARE RESHAPING THE RETAIL EXPERIENCE, (Mar. 2012), http://www.pwc.com/en_us/us/retail-consumer/publications/assets/pwc-us-multichannel-shopping-survey.pdf.

[3] Cyber Monday Ahead: Study Highlights Online Consumers, THE MEDIA AUDIT (Nov. 2013), http://view.exacttarget.com/?j=fe5817727d63077b7112&m=fef91672736d07&ls=fde71c75726d0

Walker Sands Communications study reported that 94 percent of consumers make online purchases at least four times per year, 62 percent do so at least once per month, and less than one percent have never shopped online.[4] The explosion of electronic commerce has visited profoundly negative consequences on state budgets that depend, as do most, on collection of sales and use taxes imposed on transactions involving the buying and selling of goods.

B. The Nature of Sales and Use Taxes.

Though conceptually distinct, sales and use taxes operate in complimentary fashion. A "sales tax" is assessed on the sale of a product to a consumer and typically collected and remitted to the State by the merchant. Under our federal system, however, one State may not impose a tax on a sale that occurs in another State. In order to permissibly capture the tax revenue associated with sales to its residents by out-of-state vendors, most States have enacted use taxes. A "use tax" is assessed on the use, storage, or consumption of a product (or service) purchased by a consumer in those instances where the seller does not collect and remit sales tax on the same transaction. In practical terms, then, where sales tax is not collected and remitted by the seller on a particular sale, use tax is owed by the purchaser for that transaction at the same rate. Together, sales and use taxes provide for a uniform method of taxation upon tangible personal

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07c72127975&l=fe6415767660057e7010&s=fe2c157273620378751676&jb=ffcf14&ju=fe2c17797461057b771577.

[4] WALKER SANDS COMMUNICATIONS, REINVENTING RETAIL: WHAT BUSINESSES NEED TO KNOW FOR 2014 (2014), http://www.walkersands.com/futureofretail.

property that is sold or purchased in a particular jurisdiction.

C. The *Quill* Effect on State and Local Revenues.

In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), this Court doubled down on its earlier decision in *National Bellas Hess, Inc. v. Dep't of Revenue of Illinois*, 386 U.S. 753 (1967), and held that, until Congress enacts legislation providing otherwise, the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, mandates that before a State can require an out-of-state seller to collect sales or use taxes from its residents, the seller must have a physical "nexus" or presence in the State. As a result, a State generally may not require vendors located outside of its borders to collect and remit taxes on "remote sales"—including online, home shopping, or mail-order sales—to resident customers.

Typically, state sales and use tax rates range from five to ten percent. In practical terms, this means that local merchants, personified by the "brick and mortar" store on Main Street, are starting at a five to ten percent competitive disadvantage to remote sellers. This regime of systematic discrimination enforced by the *Quill* decision hurts local economies and costs jobs.

But *Quill*'s negative impact on state and local tax revenues is even more dramatic. States and local governments "giv[e] security to life, liberty and the other privileges of dwelling in a civilized community." *Maguire v. Trefry*, 253 U.S. 12, 14 (1920) (quotation marks omitted). Without tax revenues, these governments cannot exist. Sales tax accounts for more than a third of all revenues for most States, including *half* of all tax collections in six States (Arkansas, Hawaii, Louisiana, Nevada, South Dakota, and Tennessee).[5] Consumers have increased their tendency to shop online not only with commercial titans such as Amazon and L.L. Bean, but also with sellers of any size that maintain a webpage. States and local governments have lost their ability to assess and collect tax revenues associated with those purchases where the vendor does not have a sufficient physical presence in the State.

While compliance with sales tax laws for purchases within a State is quite high, often approaching 100 percent, compliance by household consumers with state use tax imposed upon remote sales is correspondingly low.[6] When out-of-state vendors do not collect tax on purchases made by state residents, the State must rely on its residents to self-report and pay use tax on those remote sales.

Although required under existing laws to pay use tax on purchases from out-of-state merchants, most people do not do so. Experience has shown that in many states only a tiny fraction of households report any use tax at all, with compliance often as low as zero to five percent.[7] This is because most people are unfamiliar with use tax, simply assume that any tax owed has been collected by the retailer, and do not even keep track of their online or mail order purchases. The weak, almost non-existent reporting rate reflects the structural hurdles States encounter in assessing and collecting use tax on remote purchases by their residents.

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[5] NATIONAL CONFERENCE OF STATE LEGISLATURES (NCSL), STATE EFFORTS TO COLLECT REMOTE SALES TAXES (Feb. 2014), http://www.ncsl.org/documents/statefed/MFA_intheStatesFeb2014.pdf; *see also* Ryan Forster & Kail Padgitt, *Where Do State and Local Governments Get Their Tax Revenue?* 242 FISCAL NOTE Table 2 (Aug. 27, 2010), http://taxfoundation.org/article/where-do-state-and-local-governments-get-their-tax-revenue-0.

[6] *See, e.g.*, WASH. DEP'T OF REVENUE, DEPARTMENT OF REVENUE COMPLIANCE STUDY (2010), http://dor.wa.gov/Docs/Reports/Compliance_Study/compliance_study_2010.pdf (indicating that registered retailers properly collected and remitted 99 percent of all sales taxes due in 2006), ROB HOHEISEL, MINNESOTA CONSUMPTION TAX MODEL AND SALES TAX GAP (September 15, 2008), *available at* http://www.taxadmin.org/fta/meet/ 08rev_est/papers/hoheisel2.pdf (indicating that registered retailers properly collected and remitted 95.9 percent of all sales taxes due in 2004).

The skyrocketing growth in e-commerce—combined with the systematic inability of States to accurately assess or collect use tax from residents making remote purchases—has resulted in a critical sales and use tax gap, or remote sales tax loophole, in the assessment and collection of these revenues. Studies reveal that annual revenue lost by States from uncollected tax on remote sales grew nationally from $16.1 billion in 2003 to $23.2 billion in 2012, of which $11.4 billion was due solely to Internet sales.[8] In 2013, the year-over-year trend in retail sales growth was nearly three times higher for Internet and mail order shopping (11.57 percent adjusted) than for overall retail (4.31 percent adjusted).[9] And as online shopping continues to expand in coming years, so too will the losses in revenue.

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[7] U.S. GOVERNMENT ACCOUNTABILITY OFFICE, SALES TAXES: ELECTRONIC COMMERCE GROWTH PRESENTS CHALLENGES; REVENUE LOSS ARE UNCERTAIN (June 2000), http://www.gao.gov/new.items/g600165.pdf (noting widespread consensus among state officials and economists that use tax compliance by individual purchasers was extremely low). The GAO study's estimate of zero to five percent compliance among individual purchasers excluded motor vehicle purchases, for which state laws typically require sales and use taxes to be collected when the vehicle is registered with the state.

[8] DONALD BRUCE ET AL., STATE AND LOCAL GOVERNMENT SALES TAX REVENUE LOSSES FROM ELECTRONIC COMMERCE (Apr. 13, 2009), http://cber.utk.edu/ecomm/ecom0409.pdf; *see also Estimated Uncollected Use Tax From All Remote Sales*, NCSL, http://www.ncsl.org/research/fiscal-policy/collecting-ecommerce-taxes-an-interactive-map.aspx#2 (last visited Oct. 21, 2014).

Already amounting to several hundred billion dollars, this lost revenue in the form of taxes legally owed but never assessed or collected has had a debilitating effect on state and local budgets during already perilous fiscal times. At the same time that state and local governments are losing an increasing amount of their tax revenue base to remote sales, primarily in the form of e-commerce, the costs of meeting obligations to their residents have been increasing exponentially. According to the National Conference of State Legislature's survey of state legislative fiscal officers, between fiscal years 2008-2013, States closed a cumulative budget gap of $527.7 billion, primarily through spending and program reductions.[10] In FY 2012 alone, States had to close over $72 billion in budget deficits.[11]

And these obligations are only expected to increase. To cite but one example, according to National Association of State Budget Officers' (NASBO) 2013 STATE EXPENDITURE REPORT, Medicaid accounts for almost 25 percent of total state spending from all fund sources, the single largest portion of total state expenditures, and 19 percent of general fund expenditures.[12] NASBO's most recent FISCAL SURVEY OF STATES found that total Medicaid spending increased by 4.2 percent in FY 2013, is estimated to balloon to 13 percent in FY 2014, and from 2013 to 2022 is projected to continue to significantly outpace overall growth in state general fund budgets.[13] With little public appetite to increase taxes in a sluggish economy, state and local governments now—more than ever—must act with resolve to protect existing revenue streams.

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[9] UNITED STATES CENSUS, MONTHLY RETAIL TRADE SURVEY, www.census.gov/mrts/www/data/excel/mrtssales92-present.xls (last visited Oct 16, 2014).

[10] NCSL, STATE EFFORTS TO COLLECT REMOTE SALES TAXES, *supra* note 5.

[11] Submitted Statement of Senator Pamela Althoff (IL), Delegate Sheila Hixson (MD), Senator Deb Peters (SD), and Senator Curt Bramble (UT) on behalf of NCSL before U.S. Senate Finance Committee, *Hearing on Tax Reform: What It Means for State and Local Tax and Fiscal Policy* (Apr. 25, 2012).

D. Lost Opportunity: The Marketplace Fairness Act.

This Court has stressed that federal legislation authorizing States to require vendors with no physical presence to collect and remit use tax on goods sold to residents and delivered to the State would be a valid exercise of the commerce power granted to Congress by the Constitution. *See Quill*, 504 U.S. at 318 (explaining that the issue "is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve" because "[n]o matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions"). More than twenty years later, Congress continues to struggle with whether or not to accept this Court's invitation by enacting legislation. In response to this predicament, *amici* have long supported the Marketplace Fairness Act (MFA), congressional legislation that would level the playing field for local retailers and allow state and local governments to recapture revenue lost to remote sales.

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[12] NATIONAL ASSOCIATION OF STATE BUDGET OFFICERS (NASBO), STATE EXPENDITURE REPORT 44 (2011-2013), http://www.nasbo.org/sites/default/files/State%20Expenditure%20Report%20%28Fiscal%202011-2013%20Data%29.pdf.

[13] NASBO, THE FISCAL SURVEY OF STATES 54-56 (Spring 2014), http://www.nasbo.org/FISCAL-SURVEY-OF-STATES-SPRING-2014.

The MFA would remove the *Quill*-imposed preferential treatment of Internet vendors and other remote sellers by giving state and local governments the ability to require out-of-state merchants to collect the same taxes from residents that local merchants are required to collect. This would close the remote sales tax loophole and enable States to recover the estimated $23 billion owed in taxes on remote sales each year, revenue that could be dedicated to providing important public services such as infrastructure, education, health care, and public safety. Although it passed the U.S. Senate with broad bipartisan support (69-27) in 2013, the MFA[14] has yet to be enacted into law.

E. State Efforts to Recapture Remote Sales Tax Revenues.

It is critical that States be able "to raise revenue to defray the expenses of government and to distribute its burdens equally among those who enjoy its benefits." *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 279 (1932). States are entitled to considerable deference and flexibility in choosing the best methods of tax assessment and collection. Indeed, "[t]he rights of the several States to exercise the widest liberty with respect to the imposition of internal taxes always has been recognized in the decisions of this court." *Schaffer v. Carter*, 252 U.S. 37, 51 (1920).

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[14] S.743, Marketplace Fairness Act of 2013, Roll Call Vote No. 113, 113th Cong. 1st Sess. (May 6, 2013).

In the absence of congressional action, state and local governments have been forced to seek out their own solutions to the remote sales tax loophole to try to recapture lost revenues and protect their budgets, as well as their local economies. Many States have enacted streamlined sales and use tax systems to simplify collection without creating an undue burden on retailers.[15] In response to such efforts, some remote sellers have voluntarily agreed to begin collecting and remitting taxes. Other States have enacted affiliate nexus or "Amazon" laws declaring that the connection between a remote seller and in-state entities that perform certain work that can be attributed to the seller constitutes a sufficient "nexus" to the State to require the collection of use tax.[16]

Unfortunately, States and local governments are hamstrung in their ability to improve e-commerce use tax compliance because remote sales generally have not been subject to third-party reporting of information to tax authorities. Third-party reporting works quite well in achieving tax compliance because both the taxpayer and taxing authority receive the same information about what should be reported and each understands that the other has the same information.

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[15] Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Rhode Island, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *See* NCSL, STATE EFFORTS TO COLLECT REMOTE SALES TAXES, *supra* note 5.

[16] Alabama, Arkansas, California, Georgia, Illinois, Iowa, Kansas, Maine, Minnesota, Missouri, New York, North Carolina, Pennsylvania, Rhode Island, South Dakota, Vermont, and West Virginia. *See id.*

It is no surprise that, as the Internal Revenue Service has concluded, where taxable transactions are subject to third-party reporting requirements, compliance is very high, while in the absence of such requirements compliance is poor.[17] In the case of remote sales, without such information, state and local governments have no effective or efficient method by which to assess and collect use tax from their residents.

At least four states (Colorado, Oklahoma, South Dakota, and Vermont) have recently enacted certain reporting requirements on remote sellers.[18] Reporting laws enacted in the latter three States simply require remote sellers to provide notice to consumers that they may owe state use tax on the transaction.

Colorado's reporting law is more ambitious and pragmatically tailored to the task. It seeks to require remote sellers—not to collect and remit use taxes—but simply to report information on their remote sales to Colorado residents and the Colorado Department of Revenue. This will enable the State to assess and collect the applicable use tax from those residents.

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[17] KIM M. BLOOMQUIST, TRENDS AS CHANGES IN VARIANCE: THE CASE OF TAX NONCOMPLIANCE (June 2003), http://www.irs.gov/pub/irs-soi/bloomquist.pdf.

[18] *See* NCSL, STATE EFFORTS TO COLLECT REMOTE SALES TAXES, *supra* note 5.

II. This Case Is A Backdoor Effort To Restrain Lawful State Authority To Assess And Collect Use Tax In Violation Of The Tax Injunction Act.

A. The Colorado Law Was Enacted to Enable It to Assess and Collect Use Tax.

In this case, Petitioner seeks to have the federal courts declare that a law enacted by the Colorado Legislature in 2010 is invalid and enjoin its enforcement. Pet. App. E-1-E-4. The law is intended to enable the Colorado Department of Revenue to assess and collect use tax from residents who make purchases from retailers based outside of the State that are currently exempted, courtesy of *Quill*, from the requirement imposed on in-state merchants to collect and remit tax from their customers.

The Colorado law imposes three main requirements on non-resident retailers with at least $100,000 in gross annual sales to its residents: (1) they must tell Colorado customers that they may be liable for sales or use tax on a purchase; (2) they must give Colorado customers an annual summary of their purchases; and (3) they must file an annual report with the Colorado Department of Revenue listing total sales to each Colorado customer with at least $500 in purchases. COLO. REV. STAT. § 39-21-112(3.5)(c)-(d). The annual report to be filed with the Department of Revenue, in particular, provides the State with an effective means of identifying remote purchases subject to use tax, where they would otherwise go undetected, so that such taxes may be assessed and collected from the taxpayer.

In enacting this law, Colorado sensibly reasoned that requiring non-resident retailers to report accurate and complete information about annual remote purchases both to the consumer and the Department of Revenue would substantially improve the ability of the State to assess and collect use taxes from its residents. The Colorado law, then, is intended to transform the state use tax imposed upon remote sales from a largely unassessed and uncollected tax obligation into a meaningful source of state revenue.

B. Granting the Relief Sought by Petitioner Would Enjoin, Suspend, or Restrain both the "Assessment" and "Collection" of State Taxes in Violation of the TIA.

To refresh, the Tax Injunction Act prohibits federal district courts from entertaining jurisdiction over any claim seeking to "enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law[.]" 28 U.S.C. § 1341. As this Court has recognized, the TIA "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981). The TIA is "first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Id.* (citing 81 CONG. REC. 1415 (1937)); *see also California v. Grace Brethren Church*, 457 U.S. 393, 408-09 (1982).

In dismissing this case for lack of federal jurisdiction, the Tenth Circuit held that Petitioner's claims seeking to enjoin the Colorado law fell within the TIA's broad prohibition on federal suits that would restrain the collection of a state tax. Pet. App. A-33.

That decision was unsurprising; indeed, in limiting its analysis to efforts to restrain state use tax "collection," the Tenth Circuit likely did not reach broadly enough. For this Court's decisions suggest that, if successful, Petitioner's challenge to the Colorado law imposing third-party reporting requirements on remote sellers would directly enjoin, suspend, or restrain Colorado's ability to issue any "assessment" of use taxes on remote sales.

As Justice Kennedy has explained, "[t]he terms 'enjoin, suspend, or restrain,' require little scrutiny. No doubt, they have discrete purposes in the context of the TIA; but they also have a common meaning. They refer to actions that restrict assessments to varying degrees." *Hibbs v. Winn*, 542 U.S. 88, 118 (2004) (Kennedy, J., dissenting). The *Hibbs* majority further recognized that under both the TIA and tax law generally, "the assessment is the official recording of liability that triggers levy and collection efforts" against a particular taxpayer. *Id.* at 101.

In other words, a law or regulation that imposes a tax does not constitute an "assessment." *See id.* at 102 (explaining that the term "assessment" is not "synonymous with the entire plan of taxation" but instead is related "to the term's collection-propelling function"). Rather, an assessment is the taxing authority's recording of tax liability for a particular transaction upon a particular taxpayer. *Accord id.* at 117 (Kennedy, J., dissenting) ("The record-keeping that equates to the determination of taxpayer liability on the State's tax rolls is the assessment, whatever the method.").

Petitioner's suit challenges Colorado's chosen method of assessing use taxes by imposing reporting requirements that provide the information necessary to calculate and record tax assessments that would trigger collections. *See id.* at 103 n.5. Although the TIA does not prohibit interference with every possible aspect of state tax administration, it does concretely proscribe any interference "with those aspects of state tax regimes that are needed to produce revenue—i.e., assessment, levy, and collection." *Hibbs*, 542 U.S. at 105 n.7.

That is exactly what this case seeks to do. The relief it seeks would prevent state tax officials from carrying out the assessment and collection of state use tax on remote sales. Granting relief to Petitioner thus would operate to restrain Colorado's assessment of use taxes on remote sales, assessments that otherwise would initiate collections, thereby depriving the State of tens of millions in annual tax revenue. Pet. App. at A-5.

If Petitioner's suit is successful, then, "the practical effect of restraining the means of collecting state taxes would impede the only method available to the state to enforce payment." Note, *Federal Court Interference with the Assessment and Collection of State Taxes*, 59 HARV. L. REV. 780, 789 (1946). Petitioner's claims thus directly implicate the TIA's broad jurisdictional bar. *See, e.g., Blangeres v. Burlington Northern, Inc.*, 872 F.2d 327, 328 (9th Cir. 1989) (holding that TIA barred federal jurisdiction over suit seeking to prevent employer from providing earnings information to state taxing authorities where "requested injunction would preclude Idaho and Montana from taxing Burlington Northern employees because the states would be unable to obtain the information necessary for assessment"). As explained by one federal court applying the newly-minted TIA to dismiss a challenge brought by a remote seller to the cancellation of its state sales permit, "[a] suit to enjoin a tax and a suit to enjoin the use of the means provided by the taxing statute for the collection of the tax would seem to be the substantial equivalents of each other." *Sears, Roebuck & Co. v. Roddewig*, 24 F. Supp. 321, 324 (S.D. Iowa 1938).

In the clearest sense, Petitioner's federal suit seeks to enjoin, suspend, or restrain the "assessment" and subsequent "collection" of use taxes under state law. The Tenth Circuit correctly held that the TIA barred the federal courts from entertaining it.

C. A Cramped Interpretation of the TIA as Applying Solely to Challenges to State Tax Assessment and Collection Efforts Brought By Taxpayers Would Place Form Over Substance and Defeat Its Essential Purpose.

Petitioner has acknowledged, as it must, that "[t]axpayers (or their proxies) who challenge the process for obtaining information regarding their tax liability necessarily challenge the assessment of taxes against them." Pet. Br. at 49. Petitioner contends, however, that the Tax Injunction Act's jurisdictional bar applies solely to such actions brought by taxpayers contesting their personal tax liability. But no such limitation is found in the text of the statute, which removes from federal jurisdiction "any suit" within its purview, not just those suits brought by disaffected taxpayers. To begin enforcing such a judicially-created limitation now would contravene both the TIA's text and legislative intent.

This Court has previously applied the TIA's jurisdictional bar to a suit challenging the validity of a tax brought by a party other than the taxpayer. *See Kohn v. Central Distributing Co.*, 306 U.S. 531, 532-34 (1939) (affirming dismissal pursuant to TIA of attachment suit challenging the State's original assessment of alcohol beverage tax imposed on whiskey distributor brought by third-party lienholder on property). Though not brought by the affected taxpayer, the dismissal in *Kohn* comported fully with both the text and purpose of the TIA.

As this Court explained in *Hibbs*, 542 U.S. at 106, the TIA's essential purpose is to remove from federal jurisdiction challenges to those aspects of state tax administration that, if successful, "would have operated to reduce the flow of state tax revenue." This Court's holding in that case was tied to its recognition that the suit in question did not seek to interfere with the assessment of taxes in a manner that would operate to reduce tax revenues, but rather in a manner that, if successful, would increase them. *See id.* If the third-party challenge to the assessment of taxes in *Hibbs* would have operated to *reduce* revenue brought into the State's coffers, the jurisdictional outcome would have been different.

Properly interpreted, the true limitation adopted in *Hibbs* is that the TIA bars any suit, whether brought by a taxpayer or an affected third-party, so long as the action attempts to enjoin, suspend, or restrain the assessment, levy, or collection of tax revenue. *See Kohn*, 306 U.S. at 532-34; *Franchise Tax Bd. of Cal. v. Alcan Aluminum, Ltd.*, 493 U.S. 331, 339 (1990) (holding that TIA's jurisdictional bar applied to suit brought by taxpayer's shareholders); *Hill v. Kemp*, 478 F.3d 1236, 1249-50 (10th Cir. 2007) (holding that action was not excepted from TIA's jurisdictional bar on theory that plaintiffs were challenging assessment imposed on third parties).

Actions seeking to *increase* the assessment of taxes or collection of revenue, on the other hand, do not fall within the jurisdictional barrier under the rationale adopted in *Hibbs*, 542 U.S. at 106-07 ("Our prior decisions are not fairly portrayed cut loose from their secure, state-revenue protective moorings"); 17A CHARLES WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4237 (3d ed., 2007) (describing *Hibbs* holding that claims for relief were not barred by TIA as hinging on this Court's conclusion that phrase "assessment, levy or collection" was "designed to prohibit only interference with those aspects of state tax regimes that are needed to generate revenue"); *I.L. v. Alabama*, 739 F.3d 1273, 1283 (11th Cir. 2014) (explaining that *Hibbs* stands for proposition that "third-party challenges to the validity of state taxing schemes fall outside the ambit of the Tax Injunction Act if the challenges, were they to prove successful, would result in the increase of the tax liabilities of others (and therefore an increase in tax revenues to the state)").

Under this Court's precedent, the dispositive question in determining whether the TIA's jurisdictional bar applies thus is whether the plaintiff's action, if successful, would restrain the assessment, levy, or collection of state taxes so as to reduce the flow of revenue. That is the only reading of *Hibbs* consistent with both the purpose and text of the TIA. *See Grace Brethren Church*, 457 U.S. at 409 n.22 (explaining that "the legislative history of the Tax Injunction Act demonstrates that Congress worried not so much about the form of relief available in the federal courts, as about divesting the federal courts of jurisdiction to interfere with state tax administration"); *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995) (explaining that passage of the TIA reflected "background presumption that federal law generally will not interfere with administration of state taxes").

"The federal courts have for most of their history been scrupulous in the exercise of their equitable powers to avoid unnecessary interference with the administration of state taxation." *Fair Assessment In Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 126 (1981). As the result of the Tenth Circuit's decision, Petitioner has now filed its claims in Colorado state court where they await resolution on the merits pending this Court's decision on the federal jurisdictional issue. In the binding view of Congress, as expressed by its enactment of the TIA, that is the forum in which those claims must be resolved.

CONCLUSION

For the foregoing reasons, this Court should affirm the Tenth Circuit's proper application of the Tax Injunction Act to dismiss Petitioner's claims.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

No. 13-1032

IN THE
Supreme Court of the United States

DIRECT MARKETING ASSOCIATION
Petitioner,
v.

BARBARA BROHL,
IN HER CAPACITY AS EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF REVENUE,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF OF TAX FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF TAX FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *Amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *Amicus* represents both that all parties were provided notice of *Amicus*'s intention to file this brief at least 10 days before its due date and that all parties have

Tax Foundation submits this brief as *amicus curiae* in support of Petitioner in the above-captioned matter.

The Tax Foundation is a non-partisan, non-profit research organization founded in 1937 to educate taxpayers on tax policy. Based in Washington, D.C., we seek to make information about government finance more accessible to the general public. Our analysis is guided by the principles of sound tax policy: simplicity, neutrality, transparency, and stability. The Tax Foundation's Center for Legal Reform furthers these goals by educating the legal community about economics and principled tax policy.

This Court's decision will provide guidance on the line between states' power to shape their tax systems, including notification and consumer reporting requirements, and the limits on that power guarded by the Commerce Clause. Because *Amicus* has testified and written extensively on taxpayer protections and because this Court's decision may resolve a significant dispute over the interpretation of the governing statute, *Amicus* has an institutional interest in this Court's ruling.

SUMMARY OF ARGUMENT

DMA seeks to challenge the regulatory reporting and notice regime under Colorado law, not the state's ability to collect a use tax. Courts have held, that to the extent a statute challenged is regulatory rather than revenue raising in purpose, the measure does not constitute a tax, and federal courts retain jurisdic-

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filed letters with the clerk of the Court granting blanket consent to the filing of *amicus* briefs.

tion. If the lower court's conclusion that Tax Injunction Act enjoins DMA's suit stands, it will allow states to insulate over-arching regulatory regimes from proper judicial review by claiming they are a part of "tax collection" measures. The lack of limits suggested by the Tenth Circuit's decision would provide an absolute bar to a virtually endless list of state actions.

ARGUMENT

I. THE HOLDING OF THE COURT BELOW CONVERTS THE TAX INJUNCTION ACT INTO A VEILED VEHICLE BY WHICH STATE ACTIONS ARE INSULATED FROM CHALLENGE EVEN WHEN THEY DO NOT ENJOIN COLLECTION OF A TAX.

DMA seeks to challenge the regulatory reporting and notice regime under Colorado law and not their ability to collect a use tax. Colorado is not seeking to collect from DMA, or its non-remitting Colorado members. *See* COLO. REV. STAT. 39-21-112.3.5(2)-(3); Pet. App. at A-17. Colorado consumers purchasing from DMA members have an obligation to pay use tax, but DMA members without physical presence in the state face no state requirement to collect the tax. *See Direct Marketing Association v. Brohl*, --- F.3d ----, No. 1:10-CV-01546-REB-CBS at 52 (10th Cir. Aug. 20, 2013). As this Court reaffirmed in *Quill*, it is unconstitutional under the "negative" or "dormant" aspect of the Commerce Clause to mandate that a retailer with no in-state physical presence must collect state sales or use taxes. *Quill Corp. v. North Dakota*, 504 U.S. 298, 315-18 (1992) (reaffirming Commerce Clause holding in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967)). However, Colorado tries to side-step this issue by imposing an onerous two-part reporting requirement for retailers with no in-state presence.[2] *See* COLO. REV. STAT. 39-21-112.3.5(2)-(3).

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[2] The first requirement for non-collecting retailers is to "notify Colorado purchasers that sales or use tax is due on certain purchases . . . and that the state of Colorado requires the purchaser to file a sales or use tax return." COLO. REV. STAT. 39-21-112(3.5)(c)(I). This notice must be included in every transaction with a Colorado purchaser, 1 COLO. CODE REGS. § 201-1:39-21-112.3.5(2)(a), and shall inform the purchaser that (1) the retailer has not, collected sales or use tax, (2) the purchase is not exempt from Colorado sales or use tax, and (3) Colorado law requires the purchaser to file a sales or use tax return and to pay tax owed. *Id.* § 201-1:39-21-112.3.5(2)(b). According to the Department, the transactional notice "serves to educate consumers about their state use tax liability with the aim of increasing voluntary compliance.'· Aplt. Br. at 12.

The second requirement for non-collecting retailers is to mail annual notices to any customer with a Colorado address who purchased more than $500 in goods from that retailer in the preceding calendar year. 1 COLO. CODE REGS. § 201-1:39-21-112.3.5(3)(a), (c). The summary must be sent by January 31 of each year and the envelope containing it must be "prominently marked with the words 'Important tax document enclosed.'" *Id.* § 201-1:3 9-21-112.3.5(3)(a)(i), (vi). The summary must inform Colorado consumers of purchase dates, items bought, and the amount of each purchase made in the preceding calendar year. *Id.* § 201-1:39-21-112.3.5(3)(a)(ii). The annual summary tells purchasers they have a duty to "file a sales or use tax return at the end of every year" in Colorado and must inform customers that the retailer is required to report to the Department the customers' total purchase amounts from the preceding calendar year. *Id.* § 201-1:39-21-112.3.5(3)(a)(iii), (iv). According to the Department, the annual summary "arms the consumer with accurate information to facilitate reporting and paying the use tax." Aplt. Br. at 13.

Several states including: Oklahoma, South Dakota, and Vermont have also enacted statutes with the requirement that taxpayers be notified about their use tax obligation, but these states only require notification at the time of purchase. *See* OKLA. STAT.

This Court has stated that "federal courts must guard against interpretations of the Tax Injunction Act which might defeat its purpose and text." *Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 827 (1997). The Tax Injunction Act applies when (1) the surcharge at issue must constitute a "tax" and (2) the available state remedies are "plain, speedy and efficient." *See Miami Herald Pub. Co. v. City of Hallandale,* 734 F.2d 666, 670 (11th Cir. 1984), *clarified,* 742 F.2d 590 (11th Cir. 1984). The TIA "was part of a broad congressional response to the increased exposure of state officials to suits for injunctive relief after *Ex Parte Young* (209 U.S. 123 (1908))." *See* Note, "The Tax Injunction Act and Suits for Monetary Relief," 46 U. CHI. L. REV. 736, 739 (1979); *Hargrave v. McKinney,* 413 F.2d 320, 325 (5th Cir. 1969); 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4236 at 407–08 (1983).

The TIA has jurisdictional limits, which include that the state is imposing a "tax" and that there are adequate remedies in state court. See generally, 28 U.S.C. § 1341. Courts have held, that to the extent the statute challenged is regulatory rather than revenue raising in purpose, the measure does not constitute a tax, and federal courts retain jurisdiction. See *Mobil Oil Corp. v. Tully*, 639 F.2d 912, 917-18 (2d Cir. 1981); *Wells v. Malloy*, 510 F.2d 74 (2d Cir. 1975) (allowing the challenge of the Vermont Motor Vehicle Tax under the equal protection rights clause of the fourteenth amendment since the attack did not seek a restraint upon the assessment, levy or even the collection of the tax). Colorado is instead imposing extraneous regulatory requirements upon these retailers. In examining the related Butler Act, the First Circuit stated, "Not every statutory or regulatory obligation that may aid the Secretary's ability to collect a tax is immune from attack in federal court by virtue of the Butler Act's jurisdictional bar Such an interpretation extends the concept of tax collection and therefore the breadth of the Butler Act, too far." *United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323, 331 (1st Cir. 2003).

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§ 710:65-21-8; S.D. CODIFIED LAWS § 10-63-2; VT. STAT. ANN. tit. 32, § 9783(b)-(c). North Carolina's regulatory ruling imposing requirements similar to the Colorado law were challenged by the ACLU and the ruling was subsequently invalidated by a federal judge and abandoned by the department. *See* Tiffany Kaiser, *Amazon Privacy Lawsuit Settled Between NC Department of Revenue, ACLU*, Daily Tech, Feb. 9, 2011, http://goo.gl/vIUXNe. *See also* Joseph Henchman, *The Marketplace Fairness Act: A Primer on the Quill Physical Presence Rule, the Streamlined Sales Tax Project, State "Amazon" Tax Laws, the Hybrid Origin-Sourcing Proposal, and Proposed Federal Legislation*, TAX FOUNDATION BACKGROUND PAPER NO. 69 (Jul. 2014), http://taxfoundation.org/article/marketplace-fairness-act-primer.

Allowing the TIA to enjoin DMA's suit will allow states to pass over-arching regulatory regimes as part of "tax collection" measurers. Using the standard of the Tenth Circuit, any state action that seemingly touches on state revenue, no matter how tangentially, would invoke TIA's bar to federal court jurisdiction. The Ninth Circuit has recognized that such an approach is beyond the scope of the TIA. "Congress did not intend to remove federal court jurisdiction whenever some state revenue might be affected somehow." *Hexom v. Oregon Dep't of Tax.*, 177 F.3d 1134, 1136 (9th Cir. 1999). Commentators have noted that "[w]ith a reading of the TIA that expands to the bounds of comity, almost no cases even remotely involving state taxation will be able to be heard in federal court, even when a state agrees to submit itself to federal jurisdiction." David Sawyer, "News Analysis: U.S. Supreme Court Puts Tax Injunction Act Back in Focus," *State Tax Today*, at 11 (Jul. 7, 2014).

Good policy dictates that the TIA must be bound by some limits. The lack of limits suggested by the Tenth Circuit's decision would provide an absolute bar to a virtually endless list of state actions.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court reverse the decision of the Tenth Circuit Court of Appeals.

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